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MINNESOTA REPORTS

VOL. 72

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

APRIL 16, 1898—JUNE 14, 1898

HENRY B. WENZELL

REPORTER

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FRANK P. DUFRESNE
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SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE
PEOPLE OF SAID STATE

Rec. Oct. 18, 1899.

JUSTICES
OF THE
SUPREME COURT
OF MINNESOTA

DURING THE TIME OF THESE REPORTS

HON. CHARLES M. START, CHIEF JUSTICE.
HON. WILLIAM MITCHELL.
HON. LOREN W. COLLINS.
HON. DANIEL BUCK.
HON. THOMAS CANTY.

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ATTORNEY GENERAL,
HON. HENRY W. CHILDS.

NOTE.

By Laws 1895, c. 23, the reporter is required to report all cases argued and determined in the court.

By the practice of the court, based on G. S. 1894, § 4826, the headnote in each case is prepared by the judge writing the opinion.

The cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in (). The cases in this volume are from the April, 1898, term calendar, unless otherwise noted.

As required by Laws 1895, c. 23, the names of counsel are followed by their official designation, as subscribed by them to their respective briefs.

In citations from the first twenty volumes of the Minnesota reports the page of the original edition is given, preceded by the corresponding page of the edition prepared by Chief Justice Gilfillan.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF MINNESOTA.

JAMES M. FONDA v. ST. PAUL CITY RAILWAY COMPANY.

April 16, 1898.

Nos. 10,881—(262).²

G. S. 1894, § 5517—Construction.

G. S. 1894, § 5517, construed by the court, upon a motion to remit the case without payment of costs because of the inability of respondent to pay them. [Reporter.]

A motion having been made in the above entitled case, reported 71 Minn. 438, to remit without payment of costs, the following opinion was filed on April 16, 1898:

PER CURIAM.

This is a motion under G. S. 1894, § 5517, to remit this case without payment of costs, on the ground that the respondent is unable to pay them. Our construction of the statute is that, whether the costs in any given case shall be paid as a condition precedent to remitting the case and its further prosecution in the court below, is a question exclusively for this court. If the case is remitted without the costs being paid, no matter whether it is on the application of the respondent or appellant, it goes down for further proceedings in accordance with the opinion of this court, without reference to the question whether the costs have been paid or not. Now it was admitted on the hearing of this motion that this case has already been, on the application of appellant, the prevailing party, remitted without payment of the costs, therefore it is un-

¹ See note on page iv. *supra*.

² October, 1897, term.

necessary for us to consider the question whether we have jurisdiction to recall the remittitur and hear this motion on its merits.

Motion denied.

EDWIN H. McHENRY and Another v. LARS O. NYGAARD.

April 22, 1898.

. Nos. 10,871—(276).

Public Land—Decision of Controversy by Secretary of Interior—Action of Ejectment before Issue of Patent—Jurisdiction of Court.

In a contest between the Northern Pacific Railroad Company and the defendant as to which was entitled to a tract of land (each claiming under the United States), the secretary of the interior fully and finally decided the controversy, awarding the land to the defendant, to whom a final receiver's certificate was issued, reciting that he was entitled to a patent. In an action of ejectment by the receivers of the railroad company against the defendant, *held*, that the court had jurisdiction of the subject of the action, and to determine the rights of the respective parties to the land, although no patent had been issued.

Same—Indemnity Limits of N. P. R. R.—Claim of Homestead—Mere Occupancy—Necessity of Entry.

Assuming, without deciding, that lands within the indemnity limits of the Northern Pacific Railroad Company are subject to homestead entry until actually selected by the company for indemnity purposes, mere occupancy and cultivation by another, without any attempt to comply with the homestead law by applying to enter the land, or by placing the claim on record in the land office, will not defeat the company's right of selection.

Same—Selection by N. P. R. R.—Refusal by Land Department to Approve—Effect.

When the company, in accordance with all the requirements of law, makes a selection of indemnity lands, and duly files its list of selections, its right to the lands cannot be defeated or affected by the arbitrary and wrongful refusal of the officers of the land department to approve the selections.

Appeal by defendant in an action of ejectment brought against him by Edwin H. McHenry and another, as receivers of the North-

72	2
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72	2
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ern Pacific Railroad Company, from an order of the district court for Otter Tail county, Baxter, J., overruling his demurrer to the complaint. Affirmed.

John H. Allen and Parsons & Brown, for appellant.

As the patent to the land in controversy had not been issued at the date of the beginning of this action, the question of the title to the land was still within the executive branch of the government, and had not reached that point where the courts could assume cognizance of it; and the court, therefore, has no jurisdiction of the subject of the action. While the question of the right of a party claiming title to lands to which no patent has been issued to bring an action of ejectment in a state court whose system of procedure allows such an action to be brought upon an equitable title does not appear to have been directly passed upon by the United States court, it is nevertheless a fair inference from their many adjudications upon the scope of the powers of the land department that such an action cannot lie until the land department has in regular course completed its duties delegated to it by law, in the matter of transfer of title from the United States. *Johnson v. Towsley*, 13 Wall. 72; *U. S. v. Schurz*, 102 U. S. 378; *Marquez v. Frisbie*, 101 U. S. 473. In this case the title to the land is unquestionably in the United States. *Carter v. Ruddy*, 166 U. S. 493. It is still within the control of the officers of the land department. Before the issuance of a patent that department may recall and cancel any entries of the public lands. *Randall v. Edert*, 7 Minn. 359 (450); *Judd v. Randall*, 36 Minn. 12.

The attempted withdrawal of the land from entry made in January, 1872, was illegal, and without effect, for the provisions of the granting act, so far from authorizing an executive withdrawal of indemnity lands, are an express prohibition upon the power to make such withdrawal. The right of withdrawal under this act is wholly statutory and extended only to the granted or "place" lands. A withdrawal of land for indemnity purposes operates only as a notice of the limits within which the company will be entitled to select indemnity. *Northern v. Miller*, 7 L. D. 100; *Northern v. Fugelli*, 10 L. D. 288; *Spicer v. Northern*, 10 L. D. 440; *Northern*

v. Davis, 19 L. D. 87; Prince v. Eheim, 55 Minn. 36; Buttz v. Northern, 119 U. S. 55, 71; Grandin v. LaBar, 3 N. D. 446.

The granting act excepts from the operation of the grant all "lands which shall have been occupied by homestead settlers or pre-empted" prior to the filing in the land office of the plat of definite location of the road. In this respect it differs from the provisions of other railway granting acts which usually except lands "to which a pre-emption or homestead claim may have attached at the time the line of said road is definitely fixed." Under the granting act to the Northern Pacific Railroad Company, therefore, mere occupation or cultivation of the premises at the time of the filing of the map was sufficient to exclude the tract from the operation of the land grant. As no selection of the lands in controversy had been made by the railroad company at the time of the defendant's settlement thereon, it follows that defendant's settlement and occupancy gave him a right prior to that of the railroad company.

Although as between the beneficiaries of two railway grants a selection is unnecessary where all of the indemnity lands are insufficient in quantity to make up the loss from the granted or place lands (St. Paul v. Northern, 139 U. S. 1), yet where the controversy is between the railway company and settlers a selection is necessary to vest rights. U. S. v. Colton, 146 U. S. 615; Sage v. Swenson, 64 Minn. 517.

Even if defendant's occupancy gave him no rights, such rights fully attached to the land upon his application to enter made in November, 1887. His application to enter the lands, though rejected by the officers of the local land office, preserved his rights as fully as if it had been accepted. Shepley v. Cowan, 91 U. S. 330. The defendant's right to enter was not lost by his failure to make his application within the statutory time after the settlement. Johnson v. Towsley, *supra*. Defendant made his application immediately upon the revocation by the interior department of the withdrawal of these lands from entry. Until such revocation it would have been useless for him to make application, and he had a reasonable excuse for not complying with the statute in that respect within the case of Cahalan v. McTague, 46 Fed. 251.

The attempted selection by the railroad company in 1885 was invalid for the reasons: (1) Because the company failed to designate upon its selection list the losses from its grant in lieu of which the selection of the lands in controversy was made; and (2) because it does not appear that the selection was approved by the secretary of the interior. *Resser v. Carney*, 52 Minn. 397; *U. S. v. Missouri*, 141 U. S. 358; *Grandin v. LaBar*, *supra*.

James B. Kerr and C. W. Bunn, for respondents.

In this state an action to recover real estate may be maintained by one who is the equitable owner, but who has not the legal title. *Merrill v. Dearing*, 47 Minn. 137. It is also true that one may be the equitable owner of land acquired from the United States before the issuance of a patent. *County v. Hunter*, 42 Minn. 312.

In this case the railroad company became equitable owner of the land upon filing its selection in the land office, and the secretary of the interior had no authority to refuse to recognize and approve the selection. *Southern v. Wiggs*, 43 Fed. 333; *Minneapolis v. Duluth*, 45 Minn. 104; *St. Paul v. Winona*, 112 U. S. 720. The equitable title is certainly not in the United States for it has issued its final certificate. A final receipt issued to one who has done all things required by law vests in him full title against the United States. *Cornelius v. Kessel*, 128 U. S. 456. The decision of the supreme court of the United States in *Moore v. Robbins*, 96 U. S. 530, is conclusive upon the proposition that, where the secretary of the interior has committed an error of law, and has awarded a tract of land to one party to which another is rightfully entitled, and a receiver's final receipt has issued, the courts will assume jurisdiction before patent and adjust the equities of the parties.

The land department erred in awarding the land to the defendant for the reasons:

(1) Even if the land in question had been subject to homestead entry during the period of its occupation by the defendant, his mere occupation without an entry or an application in the proper land office was not sufficient under the terms of the grant to the company to invalidate the company's selection. 21 U. S. St. 141, § 3; 5 U. S. St. 620, § 3; 5 U. S. St. 457, § 15; *Northern v. Colburn*, 164 U. S. 383.

(2) The land in question was withdrawn from, and not subject to, homestead entry during the period of the defendant's occupation, and up to the time of the company's selection in 1887, by virtue of the executive order received at the land office at Alexandria January 6, 1872. This withdrawal was confessedly sufficient to prevent the acquisition of any rights by the defendant prior to the selection of the railroad company, June, 1885, if the land department had the same authority to withdraw lands from entry for the benefit of the Northern Pacific Railroad Company which it had in other cases. The general authority of the land department to make such withdrawal has been uniformly sustained. *Wolcott v. Des Moines*, 5 Wall. 681, 687; *Wolsey v. Chapman*, 101 U. S. 755; *Spencer v. McDougal*, 159 U. S. 62; *Sage v. Swenson*, 64 Minn. 517.

The decision of the secretary of the interior in the case at bar holding the withdrawal for the benefit of the railroad company inoperative to prevent acquisition of homestead rights is based upon the decision in the case of *Northern v. Miller*, 7 L. D. 100. This decision was considered in the case of *Thompson v. St. Paul*, 83 Fed. 546, in which the court held that the withdrawal was valid and the secretary of the interior was in error in holding otherwise. The proposition of the secretary of the interior that, congress having ordered a withdrawal by statute, it must be assumed that this withdrawal was intended to be exclusive of any executive withdrawal, meets with a conclusive answer in the case of *Wood v. Beach*, 156 U. S. 548, where a direction to the secretary to withdraw from the market "the lands granted by this act" was held not to exclude his authority to withdraw indemnity lands. If it be contended that indemnity lands are lands granted, then the land in controversy in this case was withdrawn by virtue of section 6 of the granting act.

The officers of the land department have uniformly construed the Northern Pacific granting act to authorize a withdrawal of lands within the indemnity limits, and under this settled construction more than forty orders of withdrawal were issued from December 12, 1871, to December 1, 1884. *Prest v. Northern*, 2 L. D. 506. See also letter of instruction of Secretary Teller to the commissioner of the general land office dated May 17, 1883, 2 L. D. 512. This

construction was unquestioned until the decision of Secretary Vilas in the Guilford-Miller case. The decisions of the supreme court of the United States are uniform in regarding with great respect the contemporaneous construction of the land department. *U. S. v. Moore*, 95 U. S. 760; *U. S. v. Macdaniel*, 7 Pet. 1; *U. S. v. Pugh*, 99 U. S. 265.

(3) Aside from any question of the withdrawal by the executive order of January 6, 1872, it is contended that the land in question has been withdrawn from homestead entry, by the provisions of section 6 of the granting act, from the time of the filing of the map of general route, October 12, 1870. *Southern v. Wiggs*, 43 Fed. 333; *St. Paul v. Northern*, 139 U. S. 1.

(4) Where all of the lands in the indemnity limits were insufficient to satisfy the losses in the place limits, the indemnity lands were all appropriated without selection and the company became at once equitable owner of the land in question by virtue of such deficiency; for the vesting of the title to place lands and indemnity lands is distinguished merely by the means of identification of the two classes of lands. Lands in place are identified by the definite location of the line of road, while indemnity lands are identified by selection. *Minneapolis v. Duluth*, 45 Minn. 104; *St. Paul v. Wiona*, 112 U. S. 720. As soon as lands are ascertained as falling within the terms of the grant, they cease to be public lands and pass to the grantee. If a selection was not necessary to identify the lands and place the company in privity with the United States, what further was required by the law to be done to earn the lands than was in fact done? The railroad company does not take title to indemnity lands by the selection; the function of the selection being merely to identify the lands as falling within the grant, when the title at once passes.

MITCHELL, J.

This was an action of ejectment. The defendant demurred to the complaint on the grounds, (1) that the court had no jurisdiction of the subject of the action; (2) that the complaint did not state a cause of action. From an order overruling the demurrer, the defendant appealed.

The complaint is very voluminous, but all the facts that can be at

all material under any view of the case may be briefly stated as follows:

July 2, 1864, congress passed what is known as the "Northern Pacific Land Grant Act," covering what are known as the "granted limits" and the "first indemnity limits" of the road. May 31, 1870, congress, by joint resolution, provided further indemnity for losses of granted or "place" lands, by fixing the second indemnity limits. October 12, 1870, the Northern Pacific Railroad Company filed a map or plat showing the proposed general route of its railroad. The land here in controversy is an odd-numbered section, within 20 miles of this line. In November, 1871, the company definitely located its line, and caused to be accepted by the secretary of the interior, and filed in the office of the commissioner of the general land office, its map of definite location. The land in controversy is within 30 miles of said line, and hence within the company's first indemnity limits.

In January, 1872, the commissioner of the general land office instructed the local land officers to withdraw from sale or homestead entry all lands within the granted or indemnity limits of the road, as determined by the map of definite location. In 1882 the defendant, a qualified homesteader, settled upon the land, and has ever since occupied and cultivated the same, but never filed upon or made application to enter it as a homestead until November, 1887. June 19, 1885, the company, complying in all respects with the instructions of the secretary of the interior, and under his directions, selected the land in question as indemnity land, and on the same day filed in the proper district land office a list showing its selections; but the officers of the land office wrongfully, and without authority of law, refused to approve the selection.

At the time of the definite location of the line of road, all the lands in the indemnity limits were insufficient to satisfy the losses in the place limits arising from previous appropriations and dispositions. In October, 1887, the secretary of the interior revoked the withdrawal order of January, 1872.

November 10, 1887, the defendant made application at the proper district land office to enter the land as a homestead, but his application was rejected, and thereupon he appealed to the commissioner

of the general land office. March 9, 1889, the commissioner of the general land office affirmed the action of the district land office and thereupon the defendant appealed to the secretary of the interior. August 11, 1894, the secretary of the interior ordered a hearing before the district land office for the purpose of adducing evidence as to the condition of the land at the date of its selection by the railroad company. January 5, 1895, the district land officers rendered a decision recommending the cancellation of the selection of the company, and the allowance of the entry of the land by the defendant as a homestead. Thereupon the company appealed. May 9, 1895, the commissioner of the general land office affirmed the decision of the district land officers. Thereupon the company appealed to the secretary of the interior. June 6, 1896, the secretary of the interior affirmed the decision of the commissioner, and ordered the cancellation of the company's selection, and the allowance of the defendant's entry as a homestead, which was thereupon done, and a final receiver's certificate issued to him, reciting that he was entitled to a patent for the land. But no patent has yet been issued.

Inasmuch as the legal points involved present federal questions, of which the supreme court of the United States is the final arbiter, it would be useless for us to discuss them at length, or to do much more than state our conclusions upon such of them as are necessary to the decision of this appeal.

1. Defendant's contention in support of his first ground of demurrer is, to use the language of his counsel, "that the question of the title of the land is still within the executive branch of the government, and has not yet reached the point where the judicial department may assume cognizance of it,"—in other words, that the matter is still *in fieri*, and under the control of the land department.

We are of opinion that this contention is not sound. It is, of course, familiar law that the courts—state or federal—have no right to invade the functions confided by law to other departments of the government, and interfere with the discharge of their duties in matters exclusively intrusted to their determination in the first instance, so long as these matters are still pending and undetermined. But after they have fully exercised their functions, and

finally determined the matter, the question becomes one of private right, and in determining that right the correctness of the action of the department becomes a proper subject of judicial inquiry.

In the present case the rights of the parties have been fully and finally determined by the secretary of the interior, and nothing remains to be done, except the merely ministerial act of issuing a patent, which will be evidence of the right previously acquired, and will, when issued, relate back to the date of entry. Whichever party is entitled to the land, nothing now remains in the United States except the bare legal title. The equitable title is in either the plaintiffs or the defendant. There is now no question pending and undetermined before the land department. The mere fact that, by reason of the non-issuance of a patent, the department still has the power to reopen the case and reverse its decision, does not deprive the courts of jurisdiction to inquire into its correctness when determining a question of private right between conflicting claimants.

The action of the courts in awarding the possession of the land to one or other of them will not deprive the department of this power, or divest the United States of the legal title. There is no presumption that the land department will ever reopen the case, or reverse its decision. It may, and presumably will, never do so; and, so long as its decision stands, it is a final determination of the matter, and there is now nothing pending and undetermined before the department. Neither party can compel the secretary of the interior to issue a patent, and, if the courts have no jurisdiction until one is issued, the defendant is not likely to request its issuance. Hence, if his contention is correct, the defendant may remain quietly in possession to the end of time, and the plaintiffs will be utterly powerless to assert their claim to the land, or to test in the courts the correctness of the decision of the department.

Counsel for the defendant feel compelled to concede in their brief that the courts have in certain cases jurisdiction of the equitable title to lands while the legal title remains in the United States; but their contention is that, in a case like the present, if the department has decided erroneously as to which party is entitled to a patent the error cannot be corrected in an action at law, but is the

basis only for equitable relief. It seems to us that by this concession counsel give away their whole case. The question here is not as to the form or nature of the judicial remedy, but whether the courts have any jurisdiction at all over the subject-matter. If the matter is still in fieri in the land department, the courts have no jurisdiction to grant any form of relief, either legal or equitable. In the federal courts, where the distinction between law and equity is still preserved, an action in ejectment could not be maintained upon an equitable title, but the rule is otherwise in this state. But on the question of jurisdiction the rule is the same in the state as in the federal courts. The only difference between the two is that, so far as the questions involved are federal ones, the final judgments of the state courts are reviewable, on a writ of error, by the supreme court of the United States. *State v. Bachelder*, 5 Minn. 178 (223).

The authorities upon the precise point under consideration are rather meager, inasmuch as, in most of the cases where the correctness of the decisions of the land department have been passed upon, patents had in fact been issued. *Moore v. Robbins*, 96 U. S. 530, would seem to support the contention of the plaintiffs. Counsel for defendant cite *Marquez v. Frisbie*, 101 U. S. 473, as a decision in their favor. In that case the plaintiff himself was in possession, and the relief which he sought was that his right to the legal title, which was still in the United States, should be decreed paramount to that of the defendant, to whom the department had awarded the land; and the court seems to have viewed this as an attempt to transfer the legal title to the plaintiff, remarking that "it is impossible to transfer a title which is still in the United States." The court also cites *Moore v. Robbins*, *supra*, without any suggestion of disapproval.

Orchard v. Alexander, 157 U. S. 372, 15 Sup. Ct. 635, and *Pierce v. Frace*, *Id.*, when considered in connection with the same cases in 2 Wash. St. 81, 26 Pac. 192, 196, also seem to support the position of the plaintiffs. In those cases the question of jurisdiction had been squarely raised and passed upon in the state court. This being apparent on the face of the record, a consideration of the cases on the merits by the supreme court of the United States would seem

to amount to an implied holding that the court had jurisdiction of the subject-matter.

2. Whether the provisions of section 6 of the act of 1864 amounted to a statutory withdrawal of indemnity land, whether the same section prohibits an executive withdrawal, and whether the indemnity lands were appropriated to the grant without any selection by the company, by reason of the fact that there was not enough of lands in the indemnity limits to make up the losses in the place limits, are questions which it is not necessary to consider. We shall assume, without deciding, that the first and third of these questions should be answered in the negative, and the second in the affirmative; also, that this land remained subject to homestead entry until actually selected by the company for indemnity purposes.

Under the allegations of the complaint, admitted by the demurrer, this land was within the indemnity limits of the grant, and the railroad company had a right to select it for indemnity purposes,—at least, until some other right attached. While the defendant entered into the occupancy and cultivation of the land in 1882, yet he did nothing by way of compliance with the homestead law, and made no application to enter it as a homestead, until November, 1887. Mere occupation and cultivation, without compliance with the law in the matter of placing the claim on record in the land office, was insufficient to defeat the right of the railroad company, under its grant, to select the land for indemnity purposes. *Northern v. Colburn*, 164 U. S. 383, 17 Sup. Ct. 98.

Under the categorical allegations of the complaint, it must be taken as true that the railroad company duly, and in compliance with all the requirements of law, selected this land for indemnity, and duly filed a list of their selections in the land office in June, 1885, but that the land officers wrongfully and unlawfully refused to approve them. Although the selection of the lieu lands was to be made under the direction of the secretary of the interior, they were to be selected by the railroad company, and not by the secretary. If the company was entitled to select the land, and did so in conformity with all the requirements of law, the officers of the land department had no authority arbitrarily to refuse to recognize and ap-

prove the selection. The rights of the company under its selection became fixed and vested notwithstanding such rejection and refusal. *Southern v. Wiggs*, 43 Fed. 333; *St. Paul v. Winona*, 112 U. S. 720, 5 Sup. Ct. 334. This selection was made about two years and four months before defendant made any application to enter the land as a homestead. This disposes of the case.

We have assumed that a patent is necessary to transfer the legal title of indemnity lands from the United States to the railway company. The act of 1864 was a grant, as well as a law, and it has been repeatedly decided that in such cases a patent is not necessary to vest the railroad company with the legal title of place lands. *St. Paul v. Northern*, 139 U. S. 1, 11 Sup. Ct. 389; *Deseret v. Tarpey*, 142 U. S. 241, 12 Sup. Ct. 158; *Northern v. Colburn*, *supra*. Whether a patent is necessary to transfer the legal title of lieu lands, we are not prepared to say. We have not met with any case where the question has been passed upon.

Order affirmed.

CANTY, J. (dissenting).

I cannot concur. I am of the opinion that the courts have no jurisdiction to dispose of the legal title to the land until that title has passed out of the United States. The controversy between the plaintiffs and defendant is still pending in the land department of the federal government, and the matter will not become *functus officio* in that department until the patent issues. The controversy between the parties cannot be transferred to the courts until the matter becomes *functus officio* in the land department. *Marquez v. Frisbie*, 101 U. S. 473; *Johnson v. Towsley*, 13 Wall. 72.

"If they [the register and receiver] give patents to the applicants for pre-emption, the courts can then, in the appropriate proceeding, determine who has the better title or right." *Litchfield v. Register*, 9 Wall. 575, 578.

See, also, last paragraph of *Gaines v. Thompson*, 7 Wall. 347. The only case cited in which the United States supreme court have acted in disregard of this principle is *Moore v. Robbins*, 96 U. S. 530, and there the question does not appear to have been raised.

The majority give as a reason for their position that while the

defendant is enjoying the benefit of the property the patent may never issue at all. True, the land department, by neglecting to issue a patent, may prejudice the rights of individuals; but there are many other instances in which the executive department of the government may prejudice the rights of individuals by delay and neglect, yet the mere possibility of such delay or neglect will not give the courts jurisdiction in matters in which they would not otherwise have it.

The position of the majority seems to be that, because the land department may neglect its duty, therefore the judgment of the court should supplant and supersede the patent, and be substituted for it. If this is not their position, then what other function will the judgment perform? Unless the land department sees fit to recognize the judgment, the plaintiffs will be in no better position to demand the patent after they have obtained their judgment than they were before, and the obtaining of the judgment will not hasten the issuing of the patent. The court could not in such a case enter a judgment which would be binding on the land department, even if the officers of that department were made parties to the suit. The patent must be signed by the president, and no proceeding in court will lie to compel its issue. *Secretary v. McGarrahan*, 9 Wall. 298, 314.

Then after the plaintiffs obtain their judgment the land department may go on and issue its patent without any interference from the court, and the plaintiffs must, after the patent is issued, commence a new action to have the title declared held in trust for them. In order to obviate the necessity for bringing such second action, the majority must hold that the judgment in the first action supplants, supersedes, and annuls in advance any patent that may thereafter be issued to any person other than the plaintiffs or their railway company; in other words, that the court has supplanted the land department, and has itself issued the patent.

In my opinion, the courts cannot usurp the powers of the executive in any such manner. Before the patent issues the courts may deal with the mere question of possession pending the proceedings in the land department, and may award such possession to the party showing such equitable title as entitles him to it. Such were

the cases of *Orchard v. Alexander* and *Pierce v. Frace*, 157 U. S. 372, 15 Sup. Ct. 635; s. c. 2 Wash. St. 81, 26 Pac. 192, 196. These were merely actions in ejectment. *Berthold v. McDonald*, 22 How. 334, was also an action of ejectment. On one day the board appointed under the statute confirmed the land to one party, and on the next day to the other party, in apparently independent proceedings. It was held that each party had an equitable title, that they stood on an equal footing before the courts, and that in order to determine which should have the possession the court must go behind the conflicting confirmations, and ascertain which of them should in justice and equity prevail. That case does not assist plaintiffs.

There are cases where congress has so completely disposed of public land that the department has no power to issue a patent for it to any one other than the one designated by congress, and a patent erroneously issued to some one else is absolutely void. In such a case an action will lie by a private party to cancel the patent. But this doctrine has no application to cases where the disposal of the land in question is committed to the land department, and its officers must exercise their judgment and discretion in determining who is entitled to the land. In such a case the issuing of the patent is the final and authentic act in the exercise of such judgment and discretion, and, if the patent is issued to the wrong person, it is not void. It transfers the legal title from the government, and the rightful claimant must then pursue that title in equity, and cannot pursue it before.

I am also of the opinion that the title to this land must pass from the government by patent. The land here in question is claimed by plaintiffs, under the grant to the Northern Pacific Railroad Company, as indemnity land. It seems to me that the grant of such lands was not one in præsentia. The right to such indemnity land would naturally depend on the existence and proof of so many extrinsic facts that it is fair to presume that congress intended that the title should pass by patent. Believing that the court has no jurisdiction to pass on the merits in this case, I decline to consider them.

BISHOP IRON COMPANY v. THOMAS W. HYDE and Others.

April 22, 1898.

Nos. 10,959—(56).¹

Judgment—Unauthorized Entry by Clerk—Remedy—Appeal.

The decision on the former appeal, 66 Minn. 24, adhered to. Where the judgment entered by the clerk is unauthorized by the verdict, findings, or order of the court, the remedy is by application to the trial court to correct or vacate the judgment, and, unless such application has been made, this court will not consider the question on appeal.

Appeal by defendant Thomas W. Hyde from two judgments of the district court for St. Louis county, one in favor of plaintiff entered pursuant to the findings and order of Ensign, J., and the other entered by the clerk in favor of the defendants, other than appellant, Hyde, upon an order of the court sustaining their demurrer to the cross bill of said Hyde. Affirmed.

John Brennan and John Jenswold, Jr., for appellant.

Draper, Davis & Hollister, for respondent Bishop Iron Company.

White & McKeon, for the other respondents.

MITCHELL, J.

Every question presented by the first ten assignments of error is covered by the decision on the former appeal (66 Minn. 24, 68 N. W. 95).

By the eleventh assignment of error it is sought to make the point that the judgment entered by the clerk in favor of the respondents, other than the plaintiff, was not the proper one to enter upon the order sustaining their demurrer to the defendants' cross bill. The error complained of was not that of the court, but that of the clerk, and the remedy is not by appeal from the judgment, but by application to the trial court to have the judgment corrected; and, unless the power of that court has been thus invoked, this court will not consider the question on appeal from the judgment. *Scott v. Minneapolis*, 42 Minn. 179, 43 N. W. 966.

Judgment affirmed.

¹ April, 1898, term.

REINHOLD Z EGLIN v. BOARD OF COUNTY COMMISSIONERS OF
CARVER COUNTY.

April 22, 1898.

Nos. 11,005—(122).

Intoxicating Liquors—License—License for Different Term—Recovery of License Fee Paid to County.

On September 7, 1893, plaintiff applied to the board of county commissioners for a license to sell intoxicating liquors for one year, and filed the necessary bond, and paid the required license fee into the county treasury. On November 14, 1893, the board granted and tendered him a license, purporting to be for a year from July 1, 1893, which plaintiff declined to accept, and demanded a license in accordance with his application, or a return of his money, which the board refused. *Held*, that the board had no authority to issue, and the plaintiff was not bound to accept, such a license, and he can maintain an action to recover back his money.

Appeal by defendant from an order of the district court for Carver county, Cadwell, J., denying its motion for a new trial after a verdict for \$520.40 in favor of plaintiff by direction of the court. *Affirmed*.

P. W. Morrison, for appellant.

H. J. Peck, for respondent.

BUCK, J.

On September 7, 1893, the plaintiff, Zeglin, then a resident of Carver county in this state, made a written application to the board of county commissioners of said county for a license to sell intoxicating liquors in the town of Waconia, in said county, for the period of one year, and to this end Zeglin paid into the county treasury the sum of \$500, the license fee, and duly executed the bond required by statute. The bond was accepted by the county, and the money so paid taken by the county and used by it for its own benefit. Subsequently, in the month of November, 1893, the board granted and issued to Zeglin a license to sell intoxicating liquor which, by its terms, commenced July 1, 1893, and expired July 1, 1894. This license Zeglin refused to accept, and shortly after its receipt he

returned it to the county auditor by letter, wherein he stated the grounds of his refusal, and requested the county auditor to deliver the license back to the board of county commissioners. The board was in session at the time of its return, and the auditor then delivered it to the board.

Upon the refusal of the board to issue a license in accordance with his application Zeglin demanded a return of the \$500 license fee so paid by him, but the board refused to pay the amount back to Zeglin. Subsequently, and in the month of March, 1894, Zeglin went before the board, and demanded a license such as he had applied for, or else a return or repayment to him of the license money so paid by him. The board refused to do either. In the month of February, 1897, he made an itemized and verified bill of his claim for the money so paid, and interest thereon, and presented it to the board, and demanded that it pay said sum back to him, which it refused to do, and thereupon he brought this action to recover the amount. Upon the trial the court directed the jury to return a verdict for the plaintiff, which it did in the sum of \$520.40.

It is to be noted that each side requested the court to direct a verdict, the plaintiff asking one in his favor and the defendant one in its favor, and neither requesting that the facts be submitted to the jury. The facts in the case were quite conclusively proven as we have stated them, and the offer of the defendant's counsel to prove other facts which were excluded by the court we do not deem material, and there were no errors in the rulings of the court in so doing.

Only one of them do we deem worthy of particular notice, viz. the defendant proposed to prove that the reason why the county commissioners did not give Zeglin a license for one year according to the terms of his application was that he had been selling liquor from July 1, 1893, and that the license actually given him was for the purpose of covering that period from July, 1893, to July, 1894. If the plaintiff had been selling liquor in violation of law from July 1, 1893, a license of the character actually issued and sent to him would not have validated such sale. Criminal acts cannot be made legal by any such proceeding, and the issuance of such

license, or even his acceptance thereof, would not have constituted a defense to his being legally prosecuted for such violation of law. Nor did the plaintiff seek any such license or proceeding to cover any such illegal sale of liquor, or make any such admission. At no time did he accept the terms and conditions of the license issued, for he repudiated them from the moment he received the license, which, immediately on its receipt, he returned, and in writing notified the county auditor and board that he would not accept it.

The board accepted his bond, took his money, and used it, then issued a license not in accordance with his application or the law, and refused to issue a license to which he was entitled under his application. The plaintiff was not bound to accept any such license. He had a right to refuse it, as he did in unmistakable terms, and in a reasonable time, and so notified the board; and the board should have issued the proper license or returned the money. See *State v. Board*, 60 Minn. 510, 62 N. W. 1135.

The conclusion thus reached leads to an affirmance of the order of the trial court, and it is so ordered.

PATRICK KELLY v. MARGARET KELLY.

April 22, 1898.

Nos. 11,019—(40).

Probate Court—Jurisdiction—Restoration of Insane Person to Capacity—G. S. 1894, § 4553—Payment of Fees on Hearing.

The constitution (article 6, § 7) provides that "a probate court shall have jurisdiction over the estates of deceased persons and persons under guardianship." *Held*, that under such provision the probate court had jurisdiction to allow and order paid out of the estate of an insane person the witness fees and attorney fees incurred upon a hearing, had upon the petition of such insane person to have his restoration to capacity judicially determined, under G. S. 1894, § 4553.

In the matter of the guardianship of Patrick Kelly, application was made by said Kelly in the probate court for Ramsey county for the allowance, out of the estate, of certain fees and expenses incurred by him in a previous proceeding for the discharge of the

guardian and the restoration of the ward to capacity. The application was granted, and the order of allowance affirmed on appeal by the district court for Ramsey county. From an order of Bunn, J., denying her motion for a new trial, the guardian, Margaret Kelly, appealed. Affirmed.

C. D. & Thos. D. O'Brien, for appellant.

Fayette Marsh and *S. Blair McBeath*, for respondent.

BUCK, J.

On April 13, 1894, Patrick Kelly was duly adjudged insane by the probate court of Ramsey county, and his wife, Margaret Kelly, was duly appointed guardian of his person and estate, and ever since has been such guardian. About April 13, 1896, said Patrick Kelly applied to said probate court to have said guardian removed, and to be restored to his capacity. The application was made in writing by Fayette Marsh, his attorney in fact, and set forth various grounds for restoration; among others, that he was sane, and capable of attending to his own business; that he owned a large amount of money, exceeding \$10,000, in various banks in the city of St. Paul; that the guardian was incompetent, and under the influence of her son, who was seeking to control said guardian and estate, to the great loss of said Patrick Kelly. It was also alleged in said petition that said Patrick Kelly was without means except said money in the hands of his guardian; that safely to proceed to the hearing of said matter, it would be necessary to subpoena numerous witnesses and experts to examine said Patrick Kelly, and testify in court as to his mental condition.

Upon the hearing the probate court made an order authorizing the petitioner to expend, under the direction and approval of the court, such sums as might be necessary to procure witnesses, medical experts, and counsel to aid said Patrick Kelly in the matter of the discharge of said guardian, and the restoration to capacity of said Patrick Kelly, said amount not to exceed the sum of \$1,000, and ordered that said amounts be paid out of the estate of said Patrick Kelly, after an order of allowance issued by said probate court.

Subsequently, upon such petition, and pursuant to the terms of

said order, a hearing was duly had upon the question of the restoration to capacity of said Patrick Kelly, and three expert medical witnesses were sworn and examined upon the question of the capacity of said Patrick Kelly. Fayette Marsh and S. Blair McBeath represented him as counsel. Thereafter an application was made to said probate court for the allowance of counsel fees and witness fees incurred upon said hearing, and said probate court, by its order dated June 30, 1896, ordered and adjudged that the sum of \$150 be paid said attorneys for their services in said matter, and the sum of \$50 be paid said expert witness, and said guardian was ordered to pay the same accordingly. Said amounts so allowed were no more than the reasonable value of the services so rendered. The guardian appealed from this allowance by the probate court to the district court, where the order of the probate court was affirmed, and from the order of the district court denying the guardian's motion for a new trial this appeal is taken.

The only question raised is this: Did the probate court have jurisdiction to allow and order paid the attorney's fees and the fees of the expert medical witnesses out of the estate of said Patrick Kelly incurred on said hearing, as the petition was denied? The constitution (article 6, § 7) provides that a "probate court shall have jurisdiction over the estates of deceased persons and persons under guardianship." It has been held by this court that such jurisdiction over persons under guardianship embraces jurisdiction over their affairs in general, including the management and disposition of their property. *Jacobs v. Fouse*, 23 Minn. 51.

G. S. 1894, § 4553, provides that any person who has been declared insane or incompetent, or the guardian or any relative or friend, may petition the probate court of the county in which he was declared insane or incompetent to have the fact of his restoration to capacity judicially determined. The court may fix a day for hearing, and cause notice to be given to the guardian, who, as well as any relative or friend, may contest the right to the relief demanded, and, in the discretion of the court, any person may make such contest. Witnesses may be required to appear and testify, and the court may, of its own motion, require such witnesses to appear and testify. If the person is found to be of sound mind,

and is capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardianship of such person cease. It was under the constitutional provision and the foregoing provisions of the statute that the probate court made the order in controversy, allowing attorney's fees and fees of the expert medical witnesses.

That the proceedings for the restoration of Kelly to capacity were lawful and proper, there can be no reasonable doubt. The probate court, before authorizing the hearing, or the expenditure of any money, must necessarily have determined that the contest was initiated in good faith, upon points on which either party might reasonably differ, and upon which the petitioner might properly claim the interposition of the court in his behalf; and, the court having so decided, he had the right under the statute to require the witnesses to appear and testify, and they would have been in contempt of court for neglect or refusal so to appear. The court possessing this compulsory power, and the witnesses obeying the process or order of the court, they were entitled to their fees after attendance and examination. G. S. 1894, § 5547, expressly provides

"That the judge of any court of record in this state, before whom any witness is summoned, or sworn and examined, as an expert in any profession or calling, may, in his discretion, allow such fees or compensation as, in his judgment, may be just and reasonable."

This section plainly permitted the court to allow the fees of the expert medical witnesses about which there is no controversy as to their being reasonable. There was no fund out of which they could or ought to be paid, except that owned by Kelly himself; and, as the proceeding was one for his benefit, the order for their payment out of such fund was proper and valid.

But we are of the opinion that the jurisdiction of the probate court to allow the witness fees and attorney's fees may stand on broader grounds. The insane are the wards of the probate court, and it controls their property, and guards their personal welfare. It may authorize the expenditure of money for their support out of their estate. From very early times the chancellor of England exercised jurisdiction over all such persons and their estates, and

this jurisdiction is now to a very great extent conferred upon our probate courts; the latter having certain equitable powers as in cases of this kind. See *Barbo v. Rider*, 67 Wis. 598, 31 N. W. 155.

If the probate court can, for the welfare of the insane, control the fund owned by him to the extent of ordering enough thereof to be applied to his clothing and other necessities, we see no well-grounded reason why it cannot allow a reasonable sum out of such estate to test the question of his right to be restored to capacity. Certainly, the liberty of the citizen is of more importance than the ordinary costs of a hearing of this kind. The proceedings were not hostile to the interests or rights of Patrick Kelly. They were intended for his benefit, duly authorized by the express terms of the statute. If the guardian has such control over the entire funds of the insane as completely to tie them up and successfully to oppose any hearing for restoration to capacity under the statute, it would thus practically become ineffectual for the purpose for which it was intended.

Section 4553 of the statute above referred to gave the insane the right to be heard, and to procure the attendance of witnesses in order to have the question of restoration judicially determined. This right to be heard includes the right to be heard by attorney, and for a reasonable compensation to be paid therefor where the proceedings were instituted in good faith. The same rule would apply in procuring necessary witnesses. Before any expenses were incurred or expenditures made, application was made to the probate court for leave to do so, and such application granted. A sound discretion was exercised by such court, and such proceedings were in no wise vexatious, and a refusal in such cases might frequently, in effect, amount to a denial of justice.

The test is not, and should not be, whether, on the hearing, it will always appear that the insane should be judicially and successfully restored to capacity, but whether there are good grounds in the first instance reasonably to believe that such will be the case. If so, the statute evidently contemplates that there shall be an honest and fair hearing, and not that all the funds shall be tied up in the hands of an obstinate or corrupt guardian, as might be the case, but that an insane man's own means may be used to restore him to

capacity, if possible, if the proper steps have been taken to this end. The right to a hearing is absolute. The petitioner's ultimate failure does not deprive him of the right to have his own means used to test the question of his continued insanity.

We are therefore of the opinion that the probate court had jurisdiction to allow the expenses incurred by Patrick Kelly on the hearing to be restored to capacity, and that the order of the district court affirming the order of said probate court was correct, and hence the order is affirmed.

W. H. RYTHER v. CITY OF AUSTIN.

April 22, 1898.

Nos. 11,021—(87).

Municipal Corporation—Negligence—Space Between Pole and Curb.

One of the poles of an electric light company, erected in the streets of the defendant under a license from the city, stood in the gutter outside the curbstone (which was 18 inches high) so as to leave a space of between four and five inches between the pole and the curbstone. The pole being circular in form, this space on each side was V-shaped. A horse hitched to the pole could not get his foot fast in the space next to him between the pole and the curbstone, but could do so only by raising his foot over the curb, and putting it into the space on the opposite side of the pole. The plaintiff, who was entirely familiar with the situation, hitched his horses to the pole, and left them there. While he was absent, the horse next the curb, becoming restive, commenced pawing with his forefeet, and placing them up on the sidewalk, and in doing so got his foot fast between the curb and the pole on the opposite side, and in his efforts to extricate himself broke his leg. *Held*, that the city was not liable; that the foregoing facts did not tend to prove actionable negligence on its part.

Appeal by defendant from an order of the district court for Mower county, Whytock, J., denying its motion for a new trial after a verdict for \$80 in favor of plaintiff. Reversed.

Greenman & Dowdall, for appellant.

Kingsley & Shepherd, for respondent.

MITCHELL, J.

The undisputed facts are as follows: About eight years ago certain parties, under a license from the defendant, erected electric light poles in the streets of the city, approximately on the line between the sidewalks and the part of the streets used by vehicles. When a cement sidewalk and curbstone were subsequently constructed on Main street, some of these poles stood outside the curb, and in the gutter. One of them stood so as to leave a space of from four to five inches between it and the curb. The pole being circular, this space on either side was V-shaped. The curbstone was about 18 inches high above the bottom of the gutter. While notices had been put on some of the poles forbidding the hitching of horses to them, yet the public had been accustomed to use the poles as hitching posts, without objection on part of either the electric company or the city.

The plaintiff, a farmer, who lived in the vicinity and was in the habit of driving into town almost every day, was entirely familiar with the situation. On the afternoon of the day in question he drove to town, hitched his horses to the pole already referred to, and went to another part of the city on business. There was a circus in town that day, and the crowds of vehicles and pedestrians on the streets would naturally make the horses somewhat restive. However that may be, the horse next the curb became rather restive, and began pawing with his forefeet, and putting them on the sidewalk, and while doing so got one of them fast in the space between the pole and the curb on the side farthest from where he was hitched. In his efforts to get loose, he fell and broke his leg, which rendered it necessary to kill him. A horse hitched to the pole could not have got his foot fast in the space on the side of the pole next to him. He could have got fast only by raising his foot clear over the curbstone and putting it into the space between the curb and the pole, on the opposite or further side. The negligence charged against the city is permitting the pole to be maintained in the gutter with such a space between the pole and the curbstone that a horse hitched to it was liable to get his foot fast in the way and manner above described.

We are of opinion that these facts do not tend to prove negli-

gence on the part of the city, and hence that the court erred in not directing a verdict for the defendant. The poles were not erected or designed for hitching posts, and the plaintiff was aware of that fact. He understood the situation, and all the risks, if any, of hitching horses to the poles, as fully as any of the city officials did. If he saw fit, for his own convenience, to use the pole as a hitching post, he took it as it was, and assumed all the risks. If he had been driving along the street at night, and collided with the pole in the dark, a very different case would have been presented.

It would be impossible to hold the city negligent without also holding the plaintiff equally or more so. As already suggested, he knew every fact which the city knew, and was certainly bound to exercise at least as great a degree of care for the safety of his horses as the city was bound to use for him. It is no answer to say that the questions of negligence and contributory negligence were for the jury. Within certain limits, this is true; but there is a point beyond which they become questions of law for the court. Moreover, the jury cannot, on such a state of facts, be permitted to contradict and stultify itself by finding that the city was negligent, but that the plaintiff was not.

But, independently of any question of contributory negligence, we are of opinion that no negligence on part of the city was proven. To hold a city liable on such a state of facts would be to establish a rule of duty for municipal corporations that would not be in accord with either justice or common sense.

Order reversed.

J. N. BROWN v. ALFRED SCHEFFER and Another.

April 22, 1898.

Nos. 11,054—(108).

Insolvency — Preference — Fraudulent Conveyance — Action against Creditor Purchasing from Fraudulent Vendee — Rights of Assignee in Insolvency.

On March 8, 1898, J. F. F., while heavily indebted to several persons, and being then insolvent, transferred a large stock of goods to his brother M. G. F., for the fraudulent purpose of avoiding the payment of the debts of the former, but not with the view to giving a preference to any of his creditors. Among these creditors were defendants, to whom he owed \$1,518.22, and this debt M. G. F. paid in full, by turning over to them the entire stock of goods which he had purchased of J. F. F. Subsequently the plaintiff was duly appointed assignee of the estate of said J. F. F., and brought suit in replevin against defendants to recover the stock of goods so turned over to the defendants. *Held*, that he was not entitled to maintain such action.

Appeal by plaintiff, as assignee in insolvency of John F. Franke, from a judgment entered in the district court for Faribault county in favor of the defendants pursuant to the findings and order of Quinn, J. Affirmed.

S. W. Graham, Hughes & Brewster and E. F. Lane, for appellant.

The defendants had full and actual knowledge of the fraudulent character of the sale of goods by John F. Franke to Mike G. Franke, and their manifest purpose in taking the note of the fraudulent vendee for the debt of the vendor, and then immediately surrendering it and taking back a bill of sale of the goods from the fraudulent vendee, in the absence of the fraudulent vendor, was to hinder, delay and defraud other creditors of John F. Franke. The transaction was therefore of no effect as a transfer and was void as against the creditors represented by the assignee. *Carter v. McDonald*, 68 Wis. 196; *La Crosse v. Wilson*, 74 Wis. 391; *Lyons v. Leahy*, 15 Ore. 8. Any transfer or sale of the property of an insolvent debtor, made with the intent to hinder, delay and defraud his creditors, with knowledge on the part of the purchaser of such in-

tent, or of sufficient facts of a suspicious nature as would naturally put a prudent person on inquiry, is wholly void even if made for cash. *Gumberg v. Treusch*, 110 Mich. 451. Such a sale cannot be held good for any purpose, even for reimbursement of the consideration paid. *Leqve v. Stoppel*, 64 Minn. 74; *Swinford v. Rogers*, 23 Cal. 233. A purchaser from a fraudulent vendee, in order to take any title must be a bona fide purchaser without notice, as well as one for a valuable consideration. *Bump*, *Fraud. Conv.* § 492; 1 *Story*, *Eq. Jur.* §§ 381, 434.

Morphy, Ewing & Gilbert and F. E. Putnam, for respondents.

The record in this case contains only the judgment roll, consisting of pleadings, findings and judgment. The only question presented, therefore, is whether the findings justified the conclusions of law. *Brigham v. Paul*, 64 Minn. 95; *Pattridge v. Jessup*, 69 Minn. 33. In this state the insolvent law does not render preferences void except in proceedings under it. *Berry v. O'Connor*, 33 Minn. 29; *Mackellar v. Pillsbury*, 48 Minn. 396. And under this law it is essential, in order to avoid a preference, to prove that the debtor made the conveyance with a view of giving a preference to the creditor upon a pre-existing debt. The appellant therefore cannot bring this case within the provisions of the insolvent law, because the court below found that the sale to the defendants was not made with a view of giving a preference to defendants or to any creditors. If, then, by the transaction the defendants did obtain a preference, the same must be judged by the common law, which allowed a debtor to give such preferences. *Butler v. White*, 25 Minn. 432.

It is the law in this and other states, where no local statute intervenes, that a sale of goods by an insolvent merchant to a creditor is valid between the parties, and such insolvent may prefer a creditor to the extent of his claim and pay him in goods at a fair price, however it may affect his other creditors. The creditor so preferred may lawfully receive the preference, although fully aware of the effect of the transaction and fully apprised of his debtor's intention as to others, provided only that he takes it in good faith as payment of his debt. And this is the law where the preference is made

by a fraudulent vendee in payment of a debt of a fraudulent vendor. *Dolan v. Van Denmark*, 35 Kan. 304; *Butler v. White*, *supra*; *Webb v. Brown*, 3 Oh. St. 246.

The action cannot be maintained as an action under the statutes of Elizabeth, for equity will not interfere to set aside a transaction of this kind unless it be made to appear affirmatively that the creditors have been substantially injured by the transfer. *Nash v. Geraghty*, 105 Mich. 382; *Buford v. Keokuk*, 3 Mo. App. 159; *Bump, Fraud. Conv.* § 552. In this case the findings utterly fail to show that the creditors have in any respect been defrauded or injured, so that no foundation is laid for the interference of a court of equity. *Oakford v. Dunlap*, 63 Ill. App. 498; *Head v. Bracht* (Tex. Civ. App.) 40 S. W. 630; *Bleiler v. Moore*, 94 Wis. 385; *Grosshans v. Gold*, 49 Neb. 599.

BUCK, J.

This is an appeal from a judgment of the district court of Fari-bault county entered in said county upon the findings of fact by the trial judge. The evidence is not returned, and the sole question is whether the conclusions of law are justified by the facts found.

On March 8, 1897, and for a long time prior thereto, one John F. Franke was a harness maker, and engaged in such business at Blue Earth City, in this state, and kept a stock of goods of the kind usually kept by harness makers, of the value of \$2,000, which stock is the personal property in controversy in this action. On said last-named day said John F. Franke was indebted on account of said business to a large number of persons, including the defendants, and to the latter he owed the sum of \$1,518.22. At such time Franke was wholly insolvent, and on that day, for the purpose of avoiding the payment of said debt, he sold said stock of goods to his brother Mike G. Franke, by a written bill of sale, and took in payment therefor the promissory notes of his said brother Mike G. Franke, for the sum of \$3,500, payable to said John F. Franke; that being the amount he was to pay for said stock of goods. Mike G. Franke took possession of said stock of goods and conducted said business up to March 16, 1897. The sale was made by John F. Franke to his brother Mike G. Franke for the purpose, on the part

of both of them, of enabling said John F. Franke to avoid the payment of said debts, said Mike G. Franke well knowing of the insolvency of his brother at the time of such sale. This sale was not made, however, by John F. Franke with a view to give any of his creditors a preference over any other of his creditors.

While said Mike G. Franke was in possession of said stock of goods and conducting said business, and on March 16, 1897, he, together with his mother, Koline Franke, for the purpose of paying and settling the defendants' claim of \$1,518.22 against John F. Franke, executed to defendants their promissory note for that amount, payable on demand, and defendants accepted said note in full settlement and payment of said claim. Thereafter, but on the same day, the defendants purchased from said Mike G. Franke the said stock of goods now in controversy, in payment for which the defendants canceled and delivered to said Mike G. Franke the said note of \$1,518.22, and thereupon the defendants immediately took possession of said stock of goods. At the time of this transaction the defendants knew that said stock of goods had previously been sold by the said John F. Franke to Mike G. Franke for the purpose of assisting the said John F. Franke in avoiding the payment of his just debts and liabilities, and that said John F. Franke was then insolvent.

On March 20, 1897, the said John F. Franke, who had thus continued to be and was then insolvent, made an assignment to the plaintiff, in due form, of all his property not exempt for the benefit of his creditors. The plaintiff, as such assignee, replevied said stock of goods, and has the same in his possession, save such portion thereof as he may have sold. This proceeding was instituted upon the theory that the defendants obtained the payment of their debt against John F. Franke with intent to obtain a preference over the other creditors of said Franke, and that both Franks were parties to the transaction. Unfortunately for the plaintiff's contention, the trial court found that, while John F. Franke sold said stock of goods to Mike G. Franke for the fraudulent purpose of avoiding the payment of his debts, yet the sale was not made with the view to giving a preference to any of his creditors.

That the transaction between the brothers was a fraudulent one

must be conceded, and, while it doubtless might have been set aside by the proper parties and by proper proceedings, yet, as between the Franks, it was valid, however fraudulent it might have been as to creditors. *New Prague v. Schreiner*, 70 Minn. 125, 72 N. W. 963. While Mike G. Franke held the title to this property as between him and his brother, he turned the same over to these defendants, who were creditors of John F. Franke, in full payment of his indebtedness to them, and upon an indebtedness existing when he sold the property to Mike G. Franke. If John F. Franke had turned the property over to the defendants while he still owned it, in payment of this indebtedness, without intent to give them a preference, the sale would have been valid. And if the defendants had attached this same property while in the hands of Mike G. Franke, upon the ground of its fraudulent sale from John F. Franke to his brother, about which there cannot be any reasonable doubt, then why did they not have the right to take the same in payment of a just debt which they held against John F. Franke?

Under the finding of the court, John F. Franke intended to cheat, hinder, and delay all of his creditors, not any particular one. If creditors other than these defendants had been vigilant, and taken steps to avoid the sale between the brothers, the property would doubtless have been secured and applied pro rata among them in payment of their debts, but this they did not do. If the defendants have been fortunate in securing full payment of their claim, it was because they were vigilant, and not because the debtor gave them a preference. At least the court so found, and there is no evidence in the record to show error in the finding.

We do not wish to be understood as holding that, if any creditor had attached these goods in the hands of Mike G. Franke, under the insolvent law other creditors could not have taken steps to have a receiver appointed, the attachment dissolved, and the property applied pro rata to the payment of the debts of the creditors of John F. Franke. But such steps were not taken, and instead thereof the assignee seeks to recover from these creditors the goods which they took in payment of their just debts without the debtor intending to give them a preference. It may be that in fact John F.

Franke did through the transaction with his brother intend to give defendants a preference over other creditors, but the evidence is not returned, and the trial court found otherwise, and by that finding we must abide.

As we have already stated, the sale was valid as between the brothers, and, while it might have been voidable as against the legal process of creditors, yet the doctrine which we find from authorities seems to be that a fraudulent vendee can do with the property all that the vendor might have done had he retained the goods. See *Butler v. White*, 25 Minn. 432; *Webb v. Brown*, 3 Oh. St. 246; *Dolan v. Van Denmark*, 35 Kan. 304, 10 Pac. 848. If the rights of other creditors seem to conflict with this rule, our answer is that ordinarily the diligent creditor is entitled to the fruits of his diligence. John F. Franke might himself have turned this identical property over to the defendants in payment of their debt, if done without any intent to give them a preference. There is a moral, as well as a legal, obligation upon the part of a debtor to pay his just debts; and when he does so out of his own means, or through a fraudulent vendee, without intending to give one creditor a preference over another, upon sound principles it ought to be held valid.

Judgment affirmed.

SARAH E. EDDY v. SARAH A. KELLY and Others.

April 22, 1898.

Nos. 11,076—(103).

Will—Construction—Payment of Legacies a Charge on Property, not on Devisee—Final Decree—Conclusiveness—Garnishment.

A testator devised to his wife certain real estate, "to be disposed of by her in such a manner as to pay" certain specified legacies. He also bequeathed to her all his personal property, "excepting that out of the property * * * she shall pay, as soon as convenient for her, and * * * within three years after" his decease these legacies. The widow elected to take under the will. Upon the full settlement of the estate the probate court made a decree of distribution, in which, after find-

72	32
75	325

72	32
86	147

ing that all the devices and bequests in the will were valid, it assigned the property, real and personal, to the widow, subject to the payment of the legacies. *Held*, that by the construction placed on the will by the probate court, which is conclusive on all parties interested, the legacies were a charge on the property, but not on the person of the widow. (Mitchell, J., concurs in the result on the ground that this is the proper construction of the will itself, and that there is nothing in conflict with it in the decree of distribution.)

Appeal by Mary Kennedy from a judgment for \$1,145.36 entered against her as garnishee in the district court for Hennepin county pursuant to the order of Russell, J. Reversed.

Wright & Matchan, for appellant.

Under the will of Patrick Kennedy, deceased, the garnishee was a trustee merely, to sell the land and distribute the proceeds in payment of the legacies, and was not personally liable for their payment. In his will the testator did not give the property to the garnishee absolutely with general directions to pay the legacies, but provided a specific manner in which they should be paid, namely, out of the proceeds of the sale of the property, which is utterly inconsistent with an intention on the part of the testator to make the devisee personally liable for their payment. The language of the will has all the attributes of a trust. 27 Am. & Eng. Enc. 35; *Haskett v. Alexander*, 134 Ind. 543; *Greenwood v. Murray*, 26 Minn. 259; *Nudd v. Powers*, 136 Mass. 273. In determining whether a will imposes upon a devisee a personal liability to pay a legacy the court will hold the devisee personally liable only when it clearly appears that such was the intention of the testator. *Smith v. Atherton*, 54 Hun, 172.

Furthermore under the language of the decree of distribution made by the probate court the legacies are merely made a charge on the property devised to the garnishee, and no personal liability on her part to pay them was created. The decree simply assigns the property "subject to the charge of" the eight legacies. It contains no direction to pay them, nor does it assign the land to the garnishee on condition that she pay them, or on account of, because of, or in respect to, the direction to pay. 13 Am. & Eng. Enc. 126,

and note 9; *Hayes v. Sykes*, 120 Ind. 180; *Nudd v. Powers*, *supra*; *Commons v. Commons*, 115 Ind. 162; *Smith v. Atherton*, *supra*; 3 *Pomeroy*, Eq. Jur. § 1246.

J. L. Dobbin, for respondent.

The decree of the probate court assigning the estate, whether it was in accordance with the correct construction of the will or not, was conclusive and binding on all persons interested in the estate of the deceased. *Ladd v. Weiskopf*, 62 Minn. 29, 34; *Greenwood v. Murray*, 26 Minn. 259; *Simpson v. Cook*, 24 Minn. 180; *State v. Jamison*, 69 Minn. 427.

When a legacy is given and directed to be paid by the person to whom the real estate is devised, such real estate is charged with the payment of the legacy. If in such case the devisee accepts the legacy he becomes personally bound to pay it, and can be compelled to pay it by an action at law upon the implied promise to pay. *Brown v. Knapp*, 79 N. Y. 136; *Etter v. Greenawalt*, 98 Pa. St. 422; *Dodge v. Manning*, 1 N. Y. 298; *Johnson v. Cornwall*, 26 Hun, 499; *Eyre's App.*, 106 Pa. St. 184.

MITCHELL, J.

Patrick Kennedy died testate in August, 1887. The here material provisions of his will are as follows:

"I give, devise, and bequeath to my wife, Mary Kennedy, the balance of said northwest quarter of said section, being eighty acres, more or less, to be disposed of by her in such manner as to pay the legacies hereinafter named in the manner hereinafter prescribed. I also give and bequeath to my said wife all my personal property of every name and nature, excepting that out of the property which I have bequeathed to her, my said wife, she shall pay, as soon as convenient for her after my death, and within the term of three years after my said decease, the sum of \$1,000 to each of my sons, John, James, Joseph, and Thomas, and my daughters, Mary, Alice, Sarah, and Margaret, which sum of \$1,000 apiece I give and bequeath to each of my last-named eight children."

The will was proven and the estate fully administered, and in September, 1888, the probate court made a decree of distribution, in which, after finding as conclusions of law that the devises and bequests made by the will were valid, and that under the will the

widow and children were entitled to the respective sums of money and tracts of land in said will described, the court made an order and decree assigning the personal property to Mary Kennedy, the widow, "subject, with the real estate described [devised] to said Mary Kennedy, to the payment of eight legacies of \$1,000 each," and also assigning to her the 80 acres of land above referred to, "subject, with the personal property bequeathed to said Mary Kennedy, to the charge of eight legacies of \$1,000 each, to be paid within three years after the decease of said Patrick Kennedy to his children [naming the eight], to each of them \$1,000."

As there is no evidence that the widow has ever filed in the probate court any writing renouncing and refusing to accept the provision made for her in the will, she must be deemed to have elected to take under the will, and in accordance with its terms and conditions. G. S. 1894, § 4472. She has never sold or disposed of the 80 acres, but is still in possession of it, and receiving the rents and profits. It does not appear what disposition, if any, she has made of the personal property. There is no evidence as to the value of this land, or as to the amount of the rents and profits. The only evidence as to the value of the personal property assigned to the widow is a finding of the probate court in its decree of distribution that it was of the value of \$1,917.42.

The plaintiff, after having obtained judgment against Sarah A. Kelly, redundant, one of the children and legatees of the deceased, Patrick Kennedy, garnished the widow; and upon a disclosure of the foregoing facts the court rendered judgment against her for \$1,000, with interest from the date when Sarah's legacy was payable under the provisions of the will, which was three years after the decease of the testator. From this judgment the garnishee appealed.

The contentions of the plaintiff in support of the judgment are: First, that the will makes the legacies to the children a charge on the person of the devisee of the land, and therefore, by accepting the devise, she became personally liable for the payment of the legacies; and, second, that this was the construction placed on the will by the probate court in the decree of distribution, and that, whether correct or incorrect, it is conclusive upon all parties inter-

ested in the estate,—citing *Greenwood v. Murray*, 26 Minn. 259, 2 N. W. 945; *Ladd v. Weiskopf*, 62 Minn. 29, 64 N. W. 99; *State v. Jamison*, 69 Minn. 427, 72 N. W. 451.

There is no doubt as to the correctness of the legal proposition that the decree concludes all parties interested as to everything necessarily involved in it, but the conclusion sought to be drawn from that proposition is wholly unwarranted. The decree contains no direction to the devisee to pay the legacies, nor does it assign the property to her on condition that she pay them. It merely assigns the property to her subject to the charge of the legacies. Such language in a will would not have made the legacies a charge on the person of a devisee, and certainly it could not have any greater effect in a decree than it would in a will.

The majority of the court are of the opinion that a decree assigning the property necessarily involved a determination of all the terms and conditions, including the question of personal liability for the legacies, upon which, under the terms of the will, the widow took the property assigned to her; and therefore that the decree is conclusive that she was not personally liable, but merely took the property subject to the charge of the legacies. If the question of her personal liability under the will for the legacies was necessarily involved in the decree of distribution, there can be no doubt of the correctness of the views of my brethren. Not being clear that the question of the personal liability of the widow for the payment of the legacies was either necessarily or properly involved in a decree assigning the property, I prefer to base my conclusion upon the construction of the will itself.

My opinion is that the will makes the legacies a charge on the property, both real and personal, but not on the person of the devisee and residuary legatee. It is undoubtedly true that, where real estate is devised with a naked direction to the devisee to pay a legacy, or upon condition that he pay it, the legacy is a charge on the person of the devisee, and, if he accepts the devise, he is personally liable for its payment. But it is equally well settled that, where the devise is merely subject to the payment of the legacy, the latter is not a charge on the person of the devisee, and the acceptance of the devise does not render him personally liable.

While the language of the will is not artistic, yet it seems to me that upon a fair construction it is clear that the intention of the testator was to make the legacies a charge upon all the property devised or bequeathed to his wife, but not to make them a charge on her person. His evident intention and expectation was that they should be paid out of the proceeds of the property, but not otherwise. His language with reference to the land is, "to be disposed of by her in such manner as to pay the legacies," and the exception or provision attached to the bequest of the personalty is that "out of the property she shall pay," etc. Had the widow faithfully disposed of all the property for the highest prices attainable, and only realized therefrom say \$4,000, it would hardly be held that she would be personally liable for \$8,000,—the amount of the eight legacies.

Under the will it was undoubtedly her duty to dispose of the property, if possible, or so much of it as was necessary, and apply the proceeds toward paying the legacies; and, if she has wrongfully neglected or refused to do so, the legatees doubtless have their remedy to enforce the charge on the property. But as, in my opinion, the will does not make the legacies a charge on the person of the widow,—which is the sole basis upon which this action rests,—the decision of the court below cannot be sustained.

We are all of opinion that the judgment must be reversed, and it is so ordered.

STATE OF MINNESOTA ex rel. CHARLES J. CASMEY v. CHARLES
TEAL.

April 22, 1898.

Nos. 11,087—(33).

72	87
86	858

Mandamus—Order Directing Issue of Writ Appealable.

An order directing the issuing of a peremptory writ of mandamus is appealable.

Bond of Treasurer of School District—Approval—Judicial Act.

The act of the director and clerk of a school district in approving the bond of the treasurer (G. S. 1894, § 3700) is one requiring the exercise of

judgment and discretion, and is therefore a judicial, as distinguished from a purely ministerial, act.

Mandamus—To Compel Action—To Control Discretion.

In such cases mandamus will lie to command action, but not to control discretion, by directing the manner in which the duty shall be performed.

Same—Amount of Bond—G. S. 1894, § 3700.

The statute requires the treasurer's bond to be in double the amount of money, as near as can be ascertained, which will come into his hands during his term. *Held*, that this refers to the aggregate amount that will come into his hands during his term, and not merely to the probable amount that will be in his hands at any one date.

Appeal by defendant from an order of the district court for Polk county, Ives, J., directing the issue of a peremptory writ of mandamus compelling him, as clerk of school district No. 218, Polk county, to approve the bond of relator as treasurer of the district. Modified.

A. A. Miller, for appellant.

It is well settled that the action of an officer requiring the exercise of judgment or discretion will not be controlled by mandamus. He can be compelled to act but the manner of his action cannot be controlled. *McHenry v. Township*, 65 Mich. 9; *Heintz v. Moulton*, 7 S. D. 272; High, Ex. Rem. § 42; 14 Am. & Eng. Enc. 98, 108. The only acts which the courts can rightfully control by mandamus are such as are purely ministerial. *State v. Kendall*, 15 Neb. 262; *U. S. v. Seaman*, 17 How. 225; *U. S. v. Guthrie*, 17 How. 284; *State v. Fairchild*, 22 Wis. 110. In the approval of official bonds the duty of deciding upon the sufficiency of the sureties involves such exercise of judgment and discretion as to be of a quasi judicial nature, and not simply ministerial. In this case, therefore, the clerk cannot be compelled to approve the bond.

DeForest Bucklen, for respondent.

The order directing the issuance of a writ of mandamus is a decision of the court on a trial without a jury, and consists of the finding of fact, conclusions of law and order for judgment; and it is therefore not an appealable order. *Johnson v. Northern*, 39 Minn. 30. The fact that the relator received a plurality of votes

for treasurer gave him an apparent right to have his bond approved if it complied with the requirements of the statute, and the result of the ballot, expressing his election, imposed on the clerk the duty of approving his bond when he should present a sufficient one. *People v. Stone*, 78 Mich. 635. The approval of the bond was a purely ministerial act and will be compelled by mandamus. *Speed v. Common*, 98 Mich. 360; *Fremont v. Crippen*, 10 Cal. 212; *Weeden v. Town*, 9 R. I. 128, 98 Am. Dec. 375, note; *Coll v. City*, 83 Mich. 367.

MITCHELL, J.

This is an appeal from an order of the district court directing the issuance of a peremptory writ of mandamus compelling the respondent, as clerk of the school district, to approve the proffered official bond of the relator as treasurer of the district.

1. Such an order is appealable. *State v. Churchill*, 15 Minn. 369 (455); *State v. Webber*, 31 Minn. 211, 17 N. W. 339.

2. The statute provides that

"The treasurer of each district shall execute a bond to the district, in double the amount of money, as near as can be ascertained, which will come into his hands as treasurer during his term, with sufficient surety, to be approved by the director and clerk, conditioned for the faithful discharge of his duties." G. S. 1894, § 3700.

The approval of the bond of a treasurer elect of a school district is an act which requires the exercise of judgment and discretion. It is therefore what is called a judicial act, as distinguished from a purely ministerial one. Where the duty is judicial and not purely ministerial, mandamus will lie to compel the exercise of official discretion or judgment, but not to direct as to the manner in which the duty shall be performed. In such cases, the function of the writ is merely to set in motion. It will be allowed to compel action, but never to control discretion. To do so would be to substitute the judgment or opinion of the court for that of the board or officer to whose judgment and discretion the determination of the matter is delegated by law.

There are cases holding that, where the proof is clear and convincing that there has been a flagrant abuse of discretion resulting

from fraud, passion, or adverse interest, the manner in which the duty shall be performed may be directed by mandamus. Whether this may be done in such extreme cases is a question which we need not consider, for this is not such a case.

We think the evidence would justify the conclusion that the respondent has never exercised his judgment or discretion in the matter, but has, in effect, refused to act at all, on the unfounded pretext that the relator was never legally elected. It would therefore have been entirely proper to issue a writ commanding the respondent to take action by either approving or disapproving the bond, so that if approved the relator could enter upon the discharge of the duties of his office, and if disapproved he might provide and tender another bond. This is as far as the direction of the writ should have gone, and in ordering a writ peremptorily commanding the respondent to approve the bond the court erred.

3. In view of further proceedings, there is another question which should be considered. The penal sum of the bond is \$1,500. There is evidence tending to show that the aggregate amount of money that will come into relator's hands as treasurer may amount to \$500 a year, or \$1,000 during his term of office, which is two years. Of course, if the current expenses of the district are paid out of this as they mature, there probably will never be anywhere near that sum in the hands of the treasurer at any one time; and for this reason the relator claims that the statute should be construed as meaning merely that the penal sum of the bond need only be double the amount of money that will probably be in the treasurer's hands at any one time. Such a provision might be a very reasonable one, but we do not think the explicit language of the statute will admit of any such construction. We think it must be construed as meaning just what it says. As the amount of money that will come into the hands of the treasurer cannot be definitely ascertained in advance, the amount of the bond must be left somewhat to the judgment and discretion of the director and clerk.

Cause remanded, with directions to the court below to modify the direction of the writ ordered to be issued, in accordance with this opinion. No statutory costs are to be allowed to the appellant on this appeal.

SAMUEL D. PETERSON v. WESTERN UNION TELEGRAPH
COMPANY.

12	41
75	371

April 22, 1898.

Nos. 11,100—(47).

Libel—Transmission by Telegraph—Publication.

A written message, alleged to be libelous, was delivered to defendant's operator at New Ulm, and by him transmitted by sound over the wires to the operator at St. Paul, to be by him reduced to writing and delivered to the plaintiff. *Held*, that this constituted a publication of the libel.

Same—Negligence—Exemplary Damages—Charge to Jury.

Mere negligence, unless so gross as to amount to positive bad faith, is not a ground for awarding punitive damages. Hence an instruction to the effect that the jury might award exemplary damages, if they found that the defendant was negligent in employing the operator who transmitted the message, or in failing to adopt proper rules to prevent the transmission of libelous messages, is erroneous.

Appeal by defendant from an order of the district court for Brown county, Webber, J., denying its motion for a new trial after a verdict for \$1,800 in favor of plaintiff. *Reversed*.

Ferguson & Kneeland, for appellant.

The broad distinction between slander and libel is that slander is the communication of defamatory matter by transitory means, like the human voice, while libel is the communication of defamatory matter by means more or less permanent, as written language, pictures and caricatures. In this case transmission of the message by telegraph over the Western Union line was wholly by sound. To the receiving operator the clicking of the instrument is a voice, intelligible like human speech. It is absolutely the same as if the message were spoken into his ear over a telephone wire. It is by his sense of hearing and not of sight that he learns the words of the message. The written message he never sees. So that if the communication to him by his fellow operator is a publication, the nature of the publication is such as to make it slander and not libel. *Townshend, S. & L.* §§ 18, 98, 99, 103, 108; *Cooley, Torts*, 193; *Odger, L. & S.* 22.

It follows that the plaintiff has no cause of action because: (1) The words complained of are not actionable unless published in writing. *Newell, S. & L.* 84; *Odger, L. & S.* 2; *Townshend, S. & L.* § 153a; *Richmond v. Post*, 69 Minn. 457; and (2) a corporation cannot be liable for slander. *Townshend, S. & L.* § 265; *Odger, L. & S.* 368; *Newell, S. & L.* 361; *Gilbert v. Crystal*, 80 Ga. 284; *Behre v. National*, 100 Ga. 213; 2 *Morawetz, Priv. Corp.* § 727.

Furthermore such a publication, if it is a publication, is privileged in the absence of express malice. A telegraph company is bound by the common law, as well as by statute, to transmit all lawful messages. It can refuse only at its peril. If it makes a mistake in refusing to transmit a message on the ground that it is unlawful, the company is liable in damages. *Gray v. Western*, 87 Ga. 350; *Western v. Ferguson*, 57 Ind. 495; G. S. 1894, § 2635; *Primrose v. Western*, 154 U. S. 1. The transmission of this message was prima facie privileged. It was privileged unless actually malicious. The publication fairly made by a person in the discharge of some public or private duty, whether legal or moral, comes within the class of privileged communications. *Toogood v. Spy-ring*, 1 C. M. & R. 181; *Marks v. Baker*, 28 Minn. 162; *Moore v. Butler*, 48 N. H. 161; *Aldrich v. Press*, 9 Minn. 123 (133); *Simmons v. Holster*, 13 Minn. 232 (249).

The question of actual malice and punitive damages should not have been submitted to the jury. Even if in sending the telegram the operator, although not legally excusable, was acting under a mistaken sense of duty, the case is at most one only for compensatory and not for vindictive damages. *Wiggin v. Coffin*, 3 Story, 1. Punitive damages are not to be inflicted except for actual malice. *Hoffman v. Northern*, 45 Minn. 53. And the malice of agent is not imputable to principal. *Eviston v. Cramer*, 57 Wis. 570; *Wardrobe v. California*, 7 Cal. 118; *Hill v. New Orleans*, 11 La. An. 292; *Detroit v. McArthur*, 16 Mich. 447; *Sedgwick, Dam.* § 523.

S. L. Pierce, for respondent.

MITCHELL, J.

This case was here on a former appeal (65 Minn. 18, 67 N. W.

646), the opinion in which may be referred to for a full statement of the facts. It was there held that the forwarding of the alleged libelous message by the defendant over its wires to its operator at St. Paul constituted a publication; that the message was on its face fairly susceptible of a libelous meaning; also that the evidence was sufficient to justify the jury in finding that defendant's operator published or transmitted the message maliciously, and not in good faith. If there is any difference between the evidence on this last point on the first trial and that adduced on the last trial, the latter is the stronger against the defendant.

The message was delivered in writing to the operator at New Ulm, and by him transmitted over the wires to the operator at St. Paul, to be by him reduced to writing and delivered to the plaintiff, which was done. The fact affirmatively appears on the second trial that the message was transmitted over the wires by sound, and the point is now made that the mode of communication was oral, and not written, and therefore there was no publication of a libel; the distinction between slander and libel being that the former is oral defamation by spoken words, while the latter consists of a publication by writing, printing, pictures, or other durable mode. The alleged materiality of the point lies in the facts that, as defendant claims, the words complained of are not actionable in themselves unless published in writing, and that a corporation cannot be liable for slander.

This point was not raised or considered on the former appeal. We are of the opinion that it is without merit. Whether the means employed by the operator at New Ulm in dictating or communicating the contents of the message to the operator in St. Paul consisted of sounds representing letters, or dots or dashes representing the same thing, can make no difference. In either case, the purpose and result would be the same, viz. the transmission and copying in written form the contents of the written message in the hands of the operator in New Ulm. The result was to put the message in the hands of the St. Paul operator in written, durable form, which he could read and understand as effectually as if the original had been placed in his possession. Words communicated for such an accomplished purpose "have an existence per se off the tongue."

When the means of reproducing the contents of a writing are by repeating its contents orally to another, to enable him to put it into writing, and the person to whom it is repeated reduces it to writing, the writing thus produced does not depend for its identification on the oral utterances of the person who reads or repeats, but on the writing itself, which is thus communicated to the person who reduces it to writing; and it can make no difference whether the contents of the writing are communicated by sound over telegraph wires by one operator to another or by a person in audible words to an amanuensis at his side. See *Pullman v. Hill* [1891] 1 Q. B. Div. 524; *McCoombs v. Tuttle*, 5 Blackf. 431; *Adams v. Lawson*, 17 Grat. 250. As long ago as *Lamb's Case*, 9 Coke, 59a, it was held that where one knowing a writing to be a libel "reads it to others that is an unlawful publication of it"; and in "*The Case De Libellis Famosis*," 5 Coke, 124b, it was held that a "libel may be published (1) *verbis aut cantilenis*, as where it is maliciously repeated or sung in the presence of others." It is not necessary to go as far as this in order to hold that the facts in the present case constituted the publication of a libel.

2. There was no evidence that the New Ulm operator was not competent and generally faithful in the discharge of his duties, or that he was ever guilty of any breach of duty, unless in the transmission of this message, and there is no evidence that the defendant had any reason, prior to its transmission, to anticipate that he would transmit an improper message. Neither is there any evidence that the defendant ratified or approved of his wrongful act (if it was such) in transmitting this message, unless it is the bare fact that it subsequently retained him in its service.

Upon this state of the evidence the court, after instructing the jury that if they found that the defendant or its agent was actuated by malice in fact, and that it ought to be punished, further instructed them in that connection as follows:

"Perhaps the only fault that can be charged against the defendant in the premises is that it had and retained an operator who would receive and transmit such improper messages, or that it did not have a rule prohibiting the sending of unsigned messages libelous upon their face; and, if the jury should be of that opinion, they

should make the amount of exemplary damages, if any, reasonably proportionate to the degree of the defendant's fault."

It should be stated in this connection that the defendant had a rule forbidding its operators from sending messages containing profane or obscene language, but none in regard to unsigned or libelous messages. When the court had completed his charge, defendant's counsel took the following exceptions:

"I except to that portion of the general charge which submits the question of punitive damages to the jury; and I especially except to that portion of the charge reading substantially as follows: [The part above quoted.]"

Then ensued the following colloquy between counsel, and between the counsel and the court:

"Mr. Pierce: If there is an exception to that part of the charge, I would consent to strike that portion of the charge out. Let's get that,—that it might be possibly construed to be a recognition of the fact of fault, I suppose that is the point counsel makes. I just as soon, if they object to do it, to have that clause stricken out. Mr. Ferguson: I have referred to that. If that is stricken out, why, then, the case should be dismissed, because there isn't any other fault of the company. Mr. Pierce: I think, perhaps, that clause might be stricken out. Mr. Ferguson: I except to it. If you want to strike it out, I move to dismiss. By the Court: I guess I won't strike it out. Mr. Ferguson: That is the gist of your action; that is why I except to it. Mr. Pierce: Now, I will ask counsel, then, the particular feature of that— What is it that you object to? Object to the question of submitting the question of punitive damages at all, under the evidence of this case? Mr. Ferguson: I except to this, which is the only specific point called out. I don't think that the question of punitive damages should be submitted to the jury. Mr. Pierce: I might say that it might be modified, with the suggestion that, if these facts might be found, it is rather a matter for the jury to determine. By the Court: I don't feel disposed to change that at present."

We are of the opinion that the part of the charge especially accepted to contains material error. It may be that it is erroneous in assuming or implying that the defendant was at fault or negligent in each and all of the matters mentioned. But that is not its chief vice. The fatal error in this part of the charge lies in the fact that, in effect and substance, it amounts to an instruction that the mere

negligence of the defendant in the respects mentioned would justify the jury in awarding punitive or exemplary damages. The defendant's liability, if any, rests upon the doctrine of respondeat superior. If the act of the servant in transmitting the message was wrongful, the defendant is liable, whether it was negligent or not; and, on the other hand, if his act was lawful, the defendant is not liable, however negligent it may have been. Hence the question of defendant's negligence in the employment of its operator, or in the failure to adopt proper rules, was really foreign to the issues in the case.

Moreover, mere negligence, unless so gross as to amount to positive bad faith, is no ground for awarding punitive damages. The liability of the defendant for such damages, if the act of the agent was actuated by malice or bad faith, is an entirely different matter. It is urged very strenuously by plaintiff's counsel that defendant is not in position to raise this objection, for the reason that, by what subsequently occurred in court, he put his exception to the charge exclusively upon the ground that the question of exemplary damages should not have been submitted to the jury at all, and that he did not specifically call the court's attention to the particular vice in this part of the charge. We cannot so construe the colloquy between the court and defendant's counsel.

Counsel took two entirely distinct exceptions: First, to the submission of the question of exemplary damages to the jury at all; and, second, to the part of the charge which stated the grounds upon which the jury might award such damages; and we cannot see anything in what followed that amounted to a waiver of either of the exceptions or a merger of the second in the first. The second exception was sufficiently explicit. Counsel called the court's attention specifically to the particular part of the charge excepted to, embodying it verbatim in his exception. We do not think he was required, under the circumstances, to go further, and explain to the court the reasons why the charge was erroneous. The error in it was not one of mere verbal inaccuracy or incompleteness of statement. As it appears that this case has been tried three times, it is unfortunate that error should have occurred on the trial, but the error is so manifest and so substantial that we cannot avoid grant-

ing a new trial. This renders it unnecessary to consider any of the other points discussed by counsel.

Order reversed.

MINNIE CROFT v. CHICAGO GREAT WESTERN RAILWAY COMPANY.

April 22, 1898.

Nos. 11,121—(176).

Railway—Killing of Cow at Crossing—Verdict Sustained by Evidence—Double Costs—G. S. 1894, § 2694.

Evidence considered and *held* sufficient to justify the verdict of the jury.

Appeal by defendant from an order of the municipal court of St. Paul, Orr, J., denying its motion for judgment notwithstanding the verdict or for a new trial, after a verdict for \$30 in favor of plaintiff. Affirmed.

Dan. W. Lawler and *John M. Blakeley*, for appellant.

John V. I. Dodd, for respondent.

BUCK, J.

Plaintiff's cow was killed by defendant's railroad train at or near where its track crosses Annapolis street, in the city of St. Paul. The train was 15 minutes behind its usual and regular time, and running rapidly, when the accident occurred. The track was not fenced, and there were no cattle guards at the crossing, so far as appears from the evidence. The defendant did not ring any bell, blow any whistle, or give any signal of danger, when approaching or crossing said street. There were no signs of warning or signal boards at this crossing. The issue involved the question of ownership of the cow, the negligence of the defendant, and the contributory negligence of the plaintiff.

The evidence of plaintiff's ownership of the cow was rather meager, and not very satisfactory, but not so entirely insufficient as to justify a reversal of the finding of the jury upon this point.

We find no warrant for the defendant's contention that the plaintiff was guilty of contributory negligence. The cow was on a public

highway, being taken by plaintiff's son to the pasture on the opposite side of the street from where she resided. She supposed the train had already passed, as it was about a quarter of an hour later than its usual time of passing over this crossing. Railroads are required, under G. S. 1894, § 2692, to fence their roads and to build cattle guards at wagon crossings, and this rule applies as well within the limits of incorporated cities and villages as to the country. *Greeley v. St. Paul*, 33 Minn. 136, 22 N. W. 179. There is an exception where public necessity or convenience requires it, such as station or depot grounds; and the burden of showing that it is not bound to fence or build cattle guards in cases of this kind rests upon the railway company. *Cox v. Minneapolis*, 41 Minn. 101, 42 N. W. 924.

But we are of the opinion that the evidence justified the jury in finding that defendant did not exercise such care as was commensurate with the hazards which might reasonably be anticipated at such a crossing. While Annapolis street had not been graded so as to admit of a convenient passage of vehicles, it was opened and used by the public, more or less for other purposes. There was evidence from which the jury might have properly found that the view of an approaching train from the crossing was to a considerable extent obstructed, and in such case a railroad company must take special care to give timely warning of its approaching train, and it is negligence for it not to do so, whether signals are required by statute or not. 4 Am. & Eng. Enc. (1st Ed.) 919, subd. 15. While there may have been no statutory duty (G. S. 1894, § 6637) to ring a bell or blow a whistle, it does not necessarily follow that the failure to do so was not negligent. *Czech v. Great Northern*, 68 Minn. 38, 70 N. W. 791. That no signal was given was one of the facts characterizing the accident, and it was one of the circumstances which, in connection with others, the jury had a right to take into account in determining whether the defendant was negligent. There was no error in admitting evidence of the facts.

Order affirmed.

Respondent having made her motion to be allowed double costs under the statute, the following opinion was filed May 4, 1898:

PER CURIAM.

Motion by respondent to be allowed to tax double costs herein. The claim is made under the provisions of G. S. 1894, § 2694. It is obvious from the language of this section that it has no reference to costs in this court, but is limited to costs in district and justice courts. Motion denied.

JOHN LUNDBERG v. ANDREW D. DAVIDSON.

April 22, 1898.

Nos. 11,143—(226).

Mortgage—Foreclosure under Power of Sale—Insanity of Mortgagor or Occupant—Validity—Inadequacy of Purchase Price—Good Faith.

The fact that the mortgagor or the occupant of the mortgaged premises has become insane does not suspend the power of sale in the mortgage, or render void a sale under it. If the power is exercised in bad faith, for the purpose of using such disability to gain an improper advantage of the mortgagor, the courts will set aside the sale. But if the mortgagee and the purchaser at the sale acted in entire good faith, and in ignorance of the disability of the mortgagor, the mere fact that the property was bid off for much less than its value, and that the mortgagor was insane at the date of the sale, and so continued until after the expiration of the time of redemption, will not of itself entitle the mortgagor to have the sale set aside, or to redeem from it, after the expiration of the period of redemption allowed by statute, especially where the purchaser at the sale has entered into lawful possession of the premises, and made valuable repairs and improvements.

Appeal by plaintiff from an order of the district court for St. Louis county, Cant, J., denying his motion for a new trial after findings and order for judgment in favor of defendant, as assignee in insolvency of the State Bank of Duluth. Affirmed.

Austin N. McGindley and *J. H. Whiteley*, for appellant.

Schmidt, Reynolds & Mitchell, for respondent.

Service of the notice of sale upon an insane occupant in foreclosure by advertisement is good. *Lundberg v. Davidson*, 68 Minn. 328.

The fact that the mortgagor becomes insane after giving the mortgage and before foreclosure does not render the foreclosure void. 2 Pingree, Mortg. § 1337; Encking v. Simmons, 28 Wis. 272; Berry v. Skinner, 30 Md. 567. Death of the mortgagor after giving the mortgage does not render the foreclosure void. Jones v. Tainter, 15 Minn. 423 (512); Reilly v. Phillips, 4 S. D. 604.

A judgment obtained against a lunatic based upon personal service of the summons is not void and cannot be collaterally attacked. Black, Judgm. §§ 205, 262; Freeman, Judgm. § 152; Vanfleet, Coll. Attack, § 459; Maloney v. Dewey, 127 Ill. 395; McAllister v. Lancaster, 15 Neb. 295. Where the notice required is a personal notice, it does not matter that the person upon whom it is served is an infant or is insane or under any other disability. 2 Jones, Mortg. § 1823; 2 Pingree, Mortg. § 1345; 26 Am. & Eng. Enc. 904; Bartlett v. Jull, 28 Grant, Ch. 140; Tracey v. Lawrence, 2 Drew, Ch. 403; Mellersh v. Keen, 27 Beav. 236; Robertson v. Lockie, 15 Sim. 285.

Mere inadequacy of price is no cause for setting aside a sale under foreclosure in the absence of fraud; but, where the inadequacy is great, the buyer who would retain the benefit of his bargain must show the good faith of the transaction. 2 Jones, Mortg. § 1670; 2 Pingree, Mortg. § 1986; 26 Am. & Eng. Enc. 952; King v. Bronson, 122 Mass. 122; Central v. Creed, 70 Cal. 497; Klein v. Glass, 53 Tex. 37; Kline v. Vogel, 11 Mo. App. 211; Fry v. Street, 44 Ark. 502; Babcock v. Canfield, 36 Kan. 437. And still less will such a sale be set aside where the property is subject to redemption; for in this case it is not to be expected that it will bring as much as at private sale, and there is no obligation on the part of a lien holder or any one else to bid any particular amount, certainly not above the amount of the lien. Wallace v. Berger, 25 Iowa, 456; Peterson v. Little, 74 Iowa, 223; Glide v. Dwyer, 83 Cal. 477; Equitable v. Schroepe, 73 Iowa, 297; Meyer v. Kuechler, 10 Mo. App. 371; Coolbaugh v. Roemer, 32 Minn. 445; Griffith v. Milwaukee, 92 Iowa, 634; Erwin v. Parham, 12 How. 197; Greenup v. Stoker, 12 Ill. 24; State v. Kerr, 51 Minn. 417; Sowle v. Champion, 16 Ind. 165; Roe v. Ross, 2 Ind. 99; Maxwell v. Newton, 65 Wis. 261; Johnson v. Cocks, 37 Minn. 530; Graffam v. Burgess, 117 U. S. 180. The

case of *Encking v. Simmons*, 28 Wis. 272, relied upon by plaintiff, was a case of rank fraud.

MITCHELL, J.¹

There was no dispute as to the facts in this case, except on two points,—the insanity of plaintiff, and the bank's knowledge of the fact,—upon which, under the evidence, the findings of the trial court are conclusive.

Plaintiff was the owner of two lots in Duluth, upon which he resided, and out of which he was entitled to a homestead exemption. His brother, Solomon, owned a lot which was incumbered by a mortgage for \$3,000 executed prior to March, 1890. On March 1, 1890, the plaintiff and his brother executed to one Hoopes their joint promissory note for \$4,000, payable in three years, with interest, and on the same day, as security for its payment, executed a mortgage covering their respective lots. This, of course, became a first lien on plaintiff's lots, and a second lien on Solomon's lot.

In February, 1891, the State Bank of Duluth obtained a judgment against plaintiff for \$6,000, and in the summer of 1894 advertised plaintiff's two lots for sale on execution. Plaintiff claimed the north or front half of the lots as his homestead, and thereupon, on June 23, 1894, the bank caused the property to be sold in two parcels, and bid in the north or front half for \$500, and the south or rear half for \$250. There has never been any redemption from this sale. This execution sale is not involved or assailed in this action.

The assignees of the Hoopes mortgage, who resided in the East, proceeded to foreclose under a power of sale, and advertised the mortgaged premises for sale at public auction on August 18, 1894. The amount then due on the mortgage was nearly \$4,800. Personal notice of the sale, as required by statute, was served on plaintiff, who, with his family, was in the actual occupancy of the lots owned by himself. The bank, having learned of the pending foreclosure, by its agent, one Turner, attended the sale. The lot of Solomon was first offered for sale, and bid in for the bank for some

¹ BUCK, J., absent, took no part.

\$3,800. This was subject to the prior mortgage for \$3,000, and also to about \$150 delinquent taxes. The two lots of plaintiff were then offered for sale as one tract, and bid in for the bank for \$1,000,—the balance claimed by the mortgagees to be due on their mortgage. These lots were subject to a lien for \$1,000 delinquent taxes. At this time the lots of the plaintiff were reasonably worth \$6,500, and the lot of his brother, Solomon, a little more,—perhaps \$7,000. There was no redemption of plaintiff's lots; the time for doing so expiring August 18, 1895.

Subsequently the bank obtained peaceable possession of the premises, and expended thereon between \$500 and \$600 in improvements and repairs. The plaintiff having afterwards re-entered the premises, the defendant, as assignee in insolvency of the bank, in an action brought for that purpose regained, and still retains, possession.

Thereafter, and in November, 1896, the plaintiff brought this action, asking that he be allowed to redeem from the mortgage foreclosure sale upon payment of the amount which it might be determined he justly owed on the mortgage. The general grounds upon which he asks for this relief are the inadequacy of price bid for the property, his insanity at the time of the sale, continuing until after the expiration of the statutory time for redemption. He also alleged a fraudulent scheme on part of the bank to take advantage of his insane condition, so as to obtain his property for a small part of its actual value; but the claim of actual fraud is practically abandoned, the main contention of the plaintiff now being that his insanity, coupled with the inadequate price for which his property was bid off, amounted to constructive fraud, which entitles him to the equitable relief prayed for. The court found as facts:

"That the plaintiff was during all of the time covered by the foreclosure proceedings in controversy herein, and up until on or about May 1, 1895, insane, and incompetent to transact business; that said insanity and incompetency were accompanied, and probably occasioned, by excessive drinking, and on or about May 1, 1895, plaintiff was by the probate court for St. Louis county, Minnesota, sent to the asylum at Rochester, in this state, as an inebriate, and was thereafter, on or about November 1, 1895, discharged from said asylum as cured; that said insanity and incom-

petency were unknown to the owner of said mortgage, and were unknown to said Charles I. Turner, the purchaser at said mortgage sale, or to the State Bank of Duluth, in whose interest said purchase was made; that the owner of said mortgage, said Charles I. Turner, and said State Bank of Duluth had no knowledge or notice of any kind of the insanity or incompetent condition of the plaintiff herein.

"That the foreclosure sale in controversy in this action was regularly and legally conducted, after due and legal notice, and the bidding thereat was open and fairly conducted, and the purchase of the property herein in controversy was made thereat by said Turner, on behalf of said State Bank of Duluth, in good faith, for the purpose of protecting the interests of said bank in said property, and not for the purpose of defrauding the plaintiff herein, or of depriving him of said property, and was made without any knowledge of the insanity or incompetency of the plaintiff herein; that said foreclosure was instituted, without the knowledge of said Turner or said bank, by the owner of said mortgage, and was instituted in good faith, and all the proceedings thereunder, including the sale and purchase by said Turner for said bank, were had in perfect good faith, and were free from fraud or oppression of any kind."

The court also found that Turner attended the sale and bid thereat for and on behalf of the bank, and made his bids thereat for the purpose of protecting its interests acquired in plaintiff's lots under the execution, and the unsatisfied portion of its judgment against the plaintiff.

All we need say about these findings is that in our opinion they were justified by the evidence. There is neither evidence nor finding that either the bank or its agent, Turner, in any way controlled or influenced the conduct of the sale. Turner simply attended as bidder, and bid on the property when it was offered for sale. We are at a loss to discover any principle of law or equity upon which, under these facts, the plaintiff is entitled to the relief which he asks.

His counsel contended very earnestly, at least in their oral argument, that the service of the notice of the foreclosure upon plaintiff while he was insane was insufficient for any purpose, and hence that the foreclosure was absolutely void; that where the occupant of the mortgaged premises is insane the power of sale is suspended, and there can be no valid foreclosure under it; that the

mortgage can only be foreclosed by action, in which a guardian ad litem may be appointed to protect his interests. This is directly contrary to what was held on the former appeal in this action. 68 Minn. 328, 71 N. W. 395. Such would not be the law even in case of a judgment obtained against the lunatic, based upon personal service of the summons upon him. Freeman, Judgm. § 152; Black, Judgm. § 205.

A foreclosure under a power is a proceeding in pais as well as in rem; and the fact that one of the terms of the exercise of the power is the service of the notice upon the occupant of the premises does not change the proceeding into a judicial one, or into a personal action against such occupant. Such a notice is in its nature analogous to notice to a tenant to quit, or a notice of a dishonored promissory note or bill of exchange. Where the notice required is a personal notice, it does not matter that the person upon whom it is served is an infant, or insane, or under any other disability. Of course such disabilities cannot be used to gain an improper advantage; and, if they are, the court will set aside the sale. As was said on the former appeal, at page 331, in such cases

“A court of equity requires a higher degree of fidelity in those who sold and bought under the power, knowing that the mortgagor was in this helpless condition.”

But no case can be found which holds that a sale under a power coupled with an interest is void on the ground that the mortgagor, or any person upon whom notice is to be served, is insane, or under any other disability. Jones, Mortg. § 1823; Pingree, Mortg. §§ 1337, 1345; 26 Am. & Eng. Enc. 904; Berry v. Skinner, 30 Md. 567; Davis v. Lane, 10 N. H. 156; Encking v. Simmons, 28 Wis. 272; Tracey v. Lawrence, 2 Drew, Ch. 403; Robertson v. Lockie, 15 Sim. 285; Mellersh v. Keen, 27 Beav. 236; Bartlett v. Jull, 28 Grant, Ch. 140.

Courts are very liberal in setting aside judgments against insane persons where the summons was served on them while under disability. They are also very liberal in permitting insane persons to repudiate or rescind contracts entered into by them while under disability, even where the other party is not at fault, pro-

vided the latter can be placed in statu quo. But we have found no case where a sale under a power exercised in perfect good faith was ever set aside merely because the mortgagor, or some party on whom notice is required to be served, was insane, or under some other disability, at the time the power was exercised, or for that reason coupled with the further fact that the price for which the property was sold was much below its actual value. Any such doctrine would render titles acquired on sales under powers exceedingly uncertain and unreliable. In fact, a mortgagee or a purchaser at the sale would never know with absolute certainty whether his foreclosure or purchase was valid.

Two of the chief advantages of a sale under a power are that it avoids the necessity of bringing in as parties all persons in interest, and also avoids the danger of a failure to secure a perfect title, by reason of a defect of parties defendant. But if such titles are liable to be set aside, notwithstanding the utmost good faith on part of both mortgagee and purchaser, merely because the property was bid in for less than it was worth, and the party in possession, whether the mortgagor or some one else, happened to have become insane, they are, of all titles, the most insecure. It is a well-known fact that under our statute, which gives a year's redemption, there is usually no competition at the sale, and really no actual sale for cash. The property is, as a rule, bid in for the amount due on the mortgage, whether that be the full value of the property, or much less. If there is any outside bidder, it is usually, as in this case, some one who has a junior lien upon or interest in the premises, which he desires to protect. It was perfectly legitimate for the bank, if it saw fit, to bid up on Solomon's lot, in which it had no interest, in order to protect its interest in plaintiff's lots under the execution sale.

Counsel for plaintiff greatly rely on *Encking v. Simmons*, supra, as supporting their contention. The opinion in that case contains some statements which, if detached from their context, and considered without reference to the particular facts, would, in our judgment, be of doubtful accuracy. It also cites some authorities which are not entirely analogous,—as, for example, cases involving contracts made while a party was insane. But that case is clearly

distinguishable on its facts from the present one, and was doubtless rightly decided. In that state, in equity cases the findings of fact of the court below are not conclusive on the appellate court, which will look into the evidence and review it in the same manner as a court of original jurisdiction, and determine for itself what facts the evidence established. *Felch v. Lee*, 15 Wis. 265.

In *Encking v. Simmons* the court, upon a review of the evidence, held that it showed that the plaintiff had been employed to hunt up the mortgagee and set the foreclosure in motion; that he and the mortgagee knew all about the insanity of the mortgagor and his confinement in the poor house; that the mortgagee bid off the premises for less than half their value, and immediately assigned the certificate of sale to the plaintiff for a slight advance over the amount bid, and gave to plaintiff an agreement to refund the purchase money, or so much of it as should not be realized from the redemption, in case the land was redeemed within the time allowed by law; that the whole proceedings were taken for the clearly-ascertained purpose of depriving the lunatic of his property; that the resort to foreclosure under the power was a cunning contrivance, devised and executed, *malo animo*, to deprive an insane man of his property. And in the course of the opinion the court, referring to what is said by Justice Story, adds at page 280,

"It shows that the true and only ground upon which courts of law, as well as equity, interfere to protect and restore the property of insane persons, and such as are otherwise non *compotes mentis*, is fraud."

Courts always lend an indulgent ear to the complaints of insane persons, and others under disability, to protect their property against fraud, or any attempt to take an unconscionable advantage of them; but we do not see how, upon the facts found in this case, the plaintiff can be granted relief, without disregarding well-settled principles of law, and unsettling titles to property.

Order affirmed.

FLORENCE LOVERIDGE v. R. M. COLES.

72	57
82	529

April 26, 1898.

Nos. 10,949—(59).

Bond for Deed—Vendor without Marketable Title—Assignment of Certificate of Location—Vendor's Heirs not Bound by Vendor's Covenant.

Plaintiff's intestate owned one-third of certain land, and her children two-thirds thereof, which they inherited from their father. She gave to the defendant a bond for a deed, wherein she covenanted, for herself and her heirs, to convey the land to him, and died without performing her covenant. *Held*, that the children, her sole heirs, are not bound by her covenant, so far as it purports to affect the interest in the land which they had when the covenant was made, and they are not bound to convey such interest to the defendant.

Same—Executory Contract of Sale—Notes for Instalments of Price—Defense—Dependent and Independent Covenants.

Where a vendee, in an executory contract for the sale and purchase of land, executes his notes for instalments of the purchase price, and takes a bond from the vendor conditioned to convey the land to him when the whole price is paid, his promises, as to all of the instalments except the last, are independent; and in an action prosecuted, before the last instalment matures, to recover on one or more of the notes, it is not a legal defense to such action that the vendor has not then a good title to the land.

Same—Rescission by Purchaser—Surrender of Benefits Received.

If the vendee in such a contract may rescind, before the last instalment becomes due, for the reason that he was induced, by the misrepresentation of the vendor as to his title, to make the contract (a question not decided), he must surrender his bond, and the possession of the land taken by virtue of the covenants in the bond, or offer so to do.

Same—Evidence Not Sufficient to Warrant Relief.

Held, that the defendant in this case did not establish facts entitling him either to a rescission of the contract or to any other equitable relief.

Appeal by defendant from an order of the district court for Washington county, Williston, J., denying the motion of plaintiff, as administratrix of the estate of Nancy J. Loveridge, deceased, for a new trial. *Affirmed*.

F. V. Comfort, for appellant.

The assignment of the certificate of location by Plummer was a valid transfer of the title to the lands to H. H. Loveridge. *Camp v. Smith*, 2 Minn. 131 (155); *Woodbury v. Dorman*, 15 Minn. 272 (338); *Sharon v. Wooldrick*, 18 Minn. 325 (354); *Lewis v. Wetherell*, 36 Minn. 386. The title to the lands having vested in H. H. Loveridge by this assignment can be removed from him only by a valid deed executed by him or by operation of law. The only pretended transfer shown to have been made by him is the unrecorded quitclaim deed made in 1886 to his wife, Nancy J. Loveridge. This deed is void under the Minnesota statute. G. S. 1894, § 5534; *Luse v. Reed*, 63 Minn. 5. The quitclaim deed covering these lands executed by Samuel C. Plummer to Nancy J. Loveridge in September, 1892, conveyed nothing; for Plummer had no interest in the lands to convey.

The defendant was entitled to rely upon the representations of the plaintiff in regard to the title to the lands. *Grosh v. Ivanhoe*, 95 Va. 161; *Carter v. Cole* (Tex. Civ. App.) 42 S. W. 369. A fraudulent purpose will be imputed to one who states of his own knowledge that a certain fact exists and induces another to act upon such statement, as in the case at bar. That the representations made were false in fact is established by the evidence in the case; and if false in fact, they were fraudulent as to defendant, and he, having relied upon them, has suffered thereby. *Bullitt v. Farrar*, 42 Minn. 8; *Stone v. Denny*, 4 Metc. (Mass.) 151; *Merriam v. Pine*, 23 Minn. 314; 2 *Warvelle, Vend.* 844; *Moulton v. Chafee*, 22 Fed. 26. There nowhere appears any evidence that plaintiff can or will perfect the title to these lands. The party in whom title is shown to be vested, having been dead more than ten years, and the obligor in the bond having never made a move to perfect the title in herself, to the time of her death, it is to be presumed there is no intention on plaintiff's part to give the defendant a title in fee simple. *Townshend v. Goodfellow*, 40 Minn. 312; *Shriver v. Shriver*, 86 N. Y. 575; *Ladd v. Weiskopf*, 62 Minn. 29.

Plaintiff cannot recover without producing upon the trial the notes taken for the purchase price. The defendant has the right to

insist upon the production and filing of the notes so that he may have a chance to know whether they are his obligations, and also to have them cancelled by the judgment when entered. *Armstrong v. Lewis*, 14 Minn. 308 (406); *St. Paul v. Cannon*, 46 Minn. 95.

Clapp & Macartney, for respondent.

It is probable that at the time the patent issued to Samuel C. Plummer, or within a reasonable time thereafter, H. H. Loveridge might have maintained an action against him to compel him to deed to Loveridge the title in fee to these lands, which unquestionably vested in Plummer when the patent issued to him. That was the only title or right to this land that he ever had. *County v. Hunter*, 42 Minn. 312; *Green v. Liter*, 8 Cranch, 229; *Bagnell v. Broderick*, 13 Pet. 436; *Brown v. Clements*, 3 How. 650; *Minter v. Crommelin*, 18 How. 87; *Hooper v. Scheimer*, 23 How. 235, 248; *Fenn v. Holme*, 21 How. 481. But this equitable right has long since been lost by laches if it has not passed to Nancy J. Loveridge by the deed to her from H. H. Loveridge.

If it be assumed for the purpose of this case that Nancy J. Loveridge did not have the title in fee to a two-thirds interest in this land, it is apparent from the record that this two-thirds interest is vested in her heirs, and they are bound, equally with her, by the covenants in the bond to convey a good title to plaintiff when he pays for the land; and there is nothing in the record from which the court can presume that they will not do so.

START, C. J.

This action was originally commenced by Nancy J. Loveridge to recover from the defendant the amount of two promissory notes dated October 7, 1895, for \$400 each, made by the defendant to her.

The answer admitted the execution of the notes, and alleged that at the time of making them, and as a part of the same transaction, and as a consideration therefor, the payee of the notes executed to the defendant her bond for a deed, whereby she agreed to sell to him the land therein described, and covenanted for herself, her heirs and personal representatives, upon payment of the two notes and one other for the sum of \$400, due October 7, 1897, to execute to him "a warranty deed in fee simple, free from all incumbrances,"

of the land therein described, which is situated in the county of Washington, in this state; that, for the purpose of inducing the defendant to enter into such transaction, she fraudulently represented to him that she was the owner of the land, and could and would convey to him, upon the payment of the purchase price thereof, an absolute title; that in fact she was not then, and never has been since, the owner of the land; and that she is a nonresident of this state, and insolvent. The answer prayed for a cancellation of the notes and general relief. The reply admitted the making of the bond, and that it and the notes were executed as one transaction, and put in issue the other allegations of the answer.

The plaintiff died pending the action, and her administratrix was substituted as plaintiff. The trial court made its findings of fact, and, as a conclusion of law, directed judgment for the plaintiff for the full amount claimed. The defendant appealed from an order denying the motion for a new trial.

The principal question on this appeal is whether the trial court's conclusion of law was justified by the facts found, which are, in substance, the following: Samuel C. Plummer, on June 2, 1856, entered the land in question by locating a land warrant thereon, and received from the proper local land officer the usual certificate, certifying that he had so entered it. Afterwards, on April 15, 1857, Plummer, by a writing by him signed, sealed, and indorsed on the back of such certificate, assumed to assign the same, and the land therein described, to H. H. Loveridge, his heirs and assigns. The assignment was in these words:

"For value received, I, Samuel C. Plummer, of the city of Rock Island, state of Illinois, to whom the within certificate of location was issued, do hereby sell and assign unto H. H. Loveridge, and to his heirs and assigns forever, the said certificate of location, and the warrant and the land therein described, and authorize him to receive the patent therefor. Witness my hand and seal this 15th day of April, 1857. Samuel C. Plummer. [Seal.]"

The certificate and assignment thereon was recorded in the office of the register of deeds of the proper county on April 27, 1883. The United States issued a patent for the land, August 18, 1858, to Plummer. H. H. Loveridge, on July 10, 1886, made his quitclaim

deed directly to his wife, Nancy J. Loveridge, whereby he assumed to convey to her, among other lands, the land in question. Loveridge died in 1887, leaving his widow, Nancy J. Loveridge, and his children, Florence and William P. Loveridge, as his sole heirs at law. Each of the children is now living, and is more than 21 years of age. Plummer and wife, September 2, 1892, executed a quit-claim deed of the land to Nancy J. Loveridge. The deed was duly recorded.

On October 7, 1895, Nancy J. Loveridge sold the land to the defendant for \$1,200, to be paid by his three promissory notes, for \$400, due in four months, one year, and two years, respectively, and she executed to him her bond for a deed, as alleged in the answer. It was agreed in the bond that the defendant was to have at once possession of the land. Nancy J. Loveridge died intestate, leaving, as her sole heirs at law, the two children of herself and husband, Florence and William P. Loveridge. The plaintiff, as administratrix of Nancy J. Loveridge, is now in possession of all three of the notes, no part of which has been paid, but only two of them were due at the time of the trial.

The trial court also found that the other allegations of the answer were not proven. This, in effect, is a finding that no representations were made and relied on as alleged in the answer, and that Nancy J. Loveridge did not die insolvent. The defendant makes the claim that neither of these findings is sustained by the evidence. The finding as to insolvency is sustained by the evidence, but the evidence is such as to require a finding that the vendor did, by her agent, represent that she was the absolute owner of the land, and that the defendant relied upon the representation, and, induced thereby, entered into the contract for the purchase of the land, but it is not such as to justify a finding that there was in fact any intentional false and fraudulent representations as to the title. The defendant's contention, that such a misrepresentation as to the title of the land, although innocently made and under the belief of its truth, having been relied upon by him, is, in legal effect, the same as if it had been an intentional misrepresentation, may be conceded. But such concession can only be material on the question of the right of the defendant to rescind.

It is clear from the facts found that the obligor did not have a marketable title to the whole of the land at the time she made the bond and agreed to convey to the defendant. Plummer, upon his entry of the land and the delivery to him of the land officer's certificate, became the equitable owner thereof. *County v. Hunter*, 42 Minn. 312, 44 N. W. 201. Such equitable title passed, by his assignment of the certificate and sale of the land, to H. H. Loveridge, and, when Plummer acquired the legal title upon the patent being issued to him, he held the legal title in trust for the equitable owner of the land, H. H. Loveridge, who attempted to convey his title to his wife, Nancy J., by a deed executed to her directly. This deed was void (*G. S.* 1894, § 5534; *Luse v. Reed*, 63 Minn. 5, 65 N. W. 91), and, on Loveridge's death, his widow, Nancy J., became the equitable owner of one-third of the land and his children of two-thirds thereof. After Mrs. Loveridge acquired the legal title, by deed from Plummer, she owned one-third of the land, and held the legal title as to the other two-thirds in trust for the children. Upon her death the whole legal and equitable title vested in the children.

This summary of the title is made upon the assumption that H. H. Loveridge made no testamentary disposition of the land, and that there are no debts of either parent chargeable against the land, there being no evidence to the contrary.

The plaintiff claims that the facts found fully justify the conclusion of law by the trial court for two reasons: (a) The heirs of the obligor are bound to convey to the defendant, upon his performance on his part of the conditions of the bond, the undivided two-thirds of the land which they inherited from their father, because they are also the heirs of their mother, the obligor in the bond, and equally bound with her to convey the land by the covenants in the bond which purport to bind her and her heirs. (b) The facts found do not constitute a defense to this action, if it be conceded that the heirs are not so bound.

1. The first proposition is untenable. It is entirely competent for the owner of land to create any charges on his land, or make any contracts in reference to it he sees fit, and thereby bind the land in the hands of his heirs, but the liability of heirs for the debts or covenants of their ancestors in no event extends beyond the

property inherited by them or its value. G. S. 1894, c. 77. Therefore the children of the vendor in this case are bound, by her covenant, to convey the land to the extent which they inherited from her, but as to the undivided two-thirds which they inherited from their father they are not bound by their mother's covenant to convey it to the defendant.

2. Whether or not the second proposition is correct presents a more serious question, and will be first considered from the standpoint of the strict legal rights of the parties. It is elementary that, where the covenants or promises in an executory contract to convey land are mutual and dependent, the party seeking to enforce the performance by the other must first perform or tender performance on his part before he can maintain an action on the promise of the other party. Thus, where, in such a contract, the whole purchase price is to be paid at one time, on a day named, and the land conveyed upon such payment being made, the promises are dependent, and the payment and conveyance are to be simultaneous acts. The vendor, in such a case, must, if he would maintain an action to recover the purchase price, be then both able and ready to convey a marketable title.

But such is not the rule where the covenants and promises are not mutual and dependent, but independent. We are then to inquire as to the character of the promises in the contract in question. Are they dependent or independent? Clearly, the promise to pay the first two instalments is independent, and the promise to pay the third instalment a dependent one. The promises are that the vendor will convey the land,

"Upon being paid the full sum of twelve hundred dollars, according to the conditions of three certain promissory notes bearing even date herewith, for the sum of four hundred dollars each, * * * due, respectively, in four months, one year and two years from date."

The defendant executed the several notes as a part of the same transaction. The promise of the defendant to pay the first two instalments, as evidenced by his notes, is independent of the vendor's promise to convey. It was expressly agreed that the first two notes were to be paid before the deed was to be made. His security

for the payments which he promised to make before the vendor could be called upon to perform her promise to convey was her bond, conditioned for a conveyance when the last instalment was paid. It may or may not have been improvident for the defendant to rely only upon the solvency of the vendor as security for his payments, but such was his contract, and the vendor was not bound to be either able or willing to convey a good title at the maturity of the first two notes. It was only at the maturity of the third note that she was thus bound.

This case falls within the rule that where a vendee, in an executory contract for the sale and purchase of land, executes his notes for instalments of the purchase price, and takes bond from the vendor conditioned to convey the land to him when the last instalment is paid, the promises of the vendee as to all of the instalments except the last are independent, and in an action prosecuted by the vendor before the last instalment becomes due, to recover on one or more of the notes then due, it is not a legal defense to such action that the vendor has not then a good title to the whole or any part of the land. 2 Warvelle, Vend. 923; Robb v. Montgomery, 20 Johns. 15; Champion v. White, 5 Cow. 509; Coleman v. Rowe, 5 How. (Miss.) 460; McMath v. Johnson, 41 Miss. 439; Runkle v. Johnson, 30 Ill. 328; s. c. 83 Am. Dec. 191, notes.

Such are the strictly legal rights of the parties hereto, but the further question remains to be considered whether, upon the facts disclosed by the record, equity will afford the defendant any relief in this action. The defendant claims that his defense is an equitable one, "for the cancellation of a contract induced by false and fraudulent representations." If by this he means that the undisputed evidence and the facts found show that he had the right to have the contract rescinded, there are respectable authorities to sustain this position. See Coburn v. Haley, 57 Me. 346; Bailey v. Jordan, 32 Ala. 50; Harvey v. Morris, 63 Mo. 475; Rimer v. Dugan, 39 Miss. 477; Davis v. Heard, 44 Miss. 50.

Conceding, without so deciding, that the defendant might have rescinded this contract, and secured a cancellation of his notes, it is clear that neither the allegations of his answer nor the facts found entitle him to such relief. The burden was upon him to

show every fact necessary to establish his right to have his notes cancelled. His title bond expressly provides that he should have immediate possession of the land. There is neither allegation nor evidence in the record that he is not in possession of the land in accordance with the terms of the bond. Nor is there any claim made that he has ever been disturbed in such possession, or that any person is claiming the land from him; yet he has not surrendered, or offered so to do, either the possession of the land or the title bond. This case, then, is within the general rule that, if the right to rescind exists, it can only be exercised by making a complete restoration of what the party received by virtue of the contract, leaving the parties as though the contract had never been made.

It may and must be conceded that in cases of executory contracts for the sale of the land, where the purchase price is payable in instalments, before the vendor is bound to convey, and an action is brought to enforce payment of one or more of them, and it is shown that the vendor has not then a marketable title and is insolvent, or that there is just and reasonable ground for believing that, if the vendee is required then to pay the instalments sued for, he will lose both his money and the land, which facts were unknown to him when he made the contract, equity, on such terms as may be just, will enjoin the prosecution of the action or the collection of the judgment until the time comes for the vendor to perform or the title is quieted, or grant such other relief as may be just. See 2 Warvelle, Vend. 937, § 14 ; *Heavner v. Morgan*, 30 W. Va. 335, 4 S. E. 406.

The defendant failed to establish such equities in this case. The trial court found that the vendor was not insolvent. There is no evidence that she died leaving any debts, nor do the facts found justify the conclusion that there is a reasonable and just apprehension that, if required to pay the instalments sued for, the defendant will lose both his money and his land. On the contrary, the reasonable probability is that, if he pays the purchase price of the land, he will secure a good title thereto; for, if there are no debts against the vendor's estate, the purchase price will go to the two heirs who own the undivided two-thirds of the land in dispute, one

of whom is the administratrix, to whom the money is to be paid. They will not be entitled to the purchase price unless the land is conveyed to the defendant, and the money if paid, and land not conveyed, will remain in the hands of the administratrix for him. In the meantime he is in possession of the land.

Again, the last instalment is now due, it having matured since the trial, and the defendant is in a position to tender performance on his part, and demand a performance of the vendor's covenant to give him a good title to the whole of the land. Of course, this is no reason why equitable relief should not be granted to him in this action, if the facts established on the trial entitle him to it; but it is a reason why the court should be fully satisfied, before granting such relief, that the facts found clearly and decisively demand it.

The last point made by the defendant is that the notes were not produced on the trial. The answer admitted the execution of the notes, and that they were in possession of the plaintiff. If the defendant desires to have them filed with the clerk before judgment is entered, he can apply to the district court for such an order. The failure to file them is no reason why a new trial should be granted.

Order affirmed.

CANTY, J. (dissenting).

I cannot concur in the foregoing opinion. I concede that if defendant entered into the contract to purchase the land, knowing that Nancy J. Loveridge had no title, he would not be entitled to any equitable relief in this action. In that case, he would have relied on her personal responsibility alone, and not on the security which he supposed he had obtained by his contract made with one who was supposed to have a good title, and his possession taken under that contract or the recording of the same. If he relied on her personal responsibility when he took the contract, law and equity would both require him, in the absence of fraud, to continue to rely on that responsibility until the time came for her to perform by delivering the deed. But the evidence will not warrant

a finding that he intended to make so foolish a bargain or that he knew that her title was defective.

I am also of the opinion that the vendee is not entitled to rescind until the vendor is given an opportunity to perform by obtaining a good title, and conveying the same when the last instalment of the purchase price falls due and all of that price is paid. This is according to the weight of authority and the better opinion. See *Pomeroy, Spec. Perf. Cont.* §§ 341, 342, and cases cited. The majority cite several authorities to the contrary, but, in my opinion, they should not be followed. But this does not imply that the vendee must rely solely on the personal covenants of the vendor, as that would leave the vendor at liberty to make a contract to sell when he knew he had no title or right, but was willing to take his chances on being able to acquire the property in the meantime. Then the vendor has no right to make a contract to sell, unless he in good faith believes that he has the title or some certain means of acquiring it, and this disposes of the theory that the vendee must rely solely on the personal covenants of the vendor.

The rule for granting relief between vendor and vendee should be very equitable and flexible. Where both parties supposed when the contract was made that the vendor had title, and it turns out that he had not, it is a case of mutual mistake, in which a court of equity should grant the proper relief. That relief may not be a rescission of the contract until such time as the vendor is required to deliver a good title. A court of equity will not, any more than a court of law, deprive him of the opportunity to procure title in the meantime. But, while the court is thus lenient with the vendor, it ought not to compel the vendee to incur an unjust and unreasonable risk. The vendee is not at fault, but the vendor is. Then why should the vendee be compelled to incur this risk? Under our practice, every court is a court of equity whenever equitable principles intervene.

In my opinion, the trial court should, as a condition precedent to the entry of judgment in favor of plaintiff, have required her to file a bond with sufficient sureties, conditioned for the return of the amount collected on the judgment in case she fails to make defendant a good title to the land at the time appointed by the con-

tract, or else the court should have stayed proceedings in this action until such time, on the filing by defendant of a bond with sufficient sureties, conditioned for the payment of the amount that may be adjudged against him in this action. The trial court refused to find that Nancy J. Loveridge was insolvent at the time of her death (she died during the pendency of the action). There are cases in which equitable relief similar to that here proposed has been granted, where it affirmatively appeared that the vendor was insolvent. See *Hunter v. Bradford*, 3 Fla. 269.

While there may be no precedent for granting such relief, where it does not appear that the vendor was insolvent, yet it seems to me that the principles involved are plain. All the authorities hold that no equitable relief should be granted to the defendant in such a case as this, but I submit that the cases which so hold are based on a wrong theory, to-wit, that, as to the instalments of the purchase price which the vendee agrees to pay in advance of receiving the deed, he receives no present consideration at the time he makes the payment of each instalment, but must trust wholly to the personal covenants of the vendor. This is not true. If the vendor has title, and the vendee is in possession or has recorded his contract, every time he pays such an instalment he increases his present equitable interest in the land to the amount of the payment, and the courts should not offer the vendor a premium on depriving the vendee of this right.

Clearly, the contract is ordinarily intended to give, on the part of the vendor, something more than his personal covenant to the vendee. There is no principle better established in equity than that which holds that the vendee is the equitable owner of the land.

"Equity says that from the contract, even while yet executory, the vendee acquires a 'real' right, a right of property in the land, which, though lacking a legal title and therefore equitable only, is none the less the real, beneficial ownership, subject, however, to a lien of the vendor as security for the purchase price as long as that remains unpaid." 1 Pomeroy, Eq. Jur. § 105.

If the vendee's contract was intended to give him this present real ownership, but fails to do so because the vendor had no title,

it is the duty of a court of equity to protect the vendee against substantial risk, whether the vendor is solvent or insolvent. And who can say that the risk in this case is not substantial?

The doctrine of the courts on this question might not, as a rule, have worked serious injustice a hundred years ago, in England, where there were no exemption laws, and the remedy of imprisonment for debt existed. Under such circumstances, few could afford to become insolvent or to retain what did not belong to them after a judgment was entered against them for the return of it. But in these modern times, in this country, where we have exemption laws, and parties can dispose of their property and become execution proof so easily, the risk is very great which a vendee must run if he must pay such instalments, and trust solely to the future personal responsibility of the vendor when the latter has no title.

Again, for the same reasons, the law is very crude and unjust which requires a vendee who has taken possession and made valuable improvements or paid a part of the purchase price to surrender possession before he can rescind the contract for fraud or failure of title. He should be allowed to hold the possession as security for the repayment of such part of the purchase price, and the payment to him of the value of his improvements, and he should also be awarded a lien for the same on such title or interest as the vendor may have in the land. In my opinion this case should be remanded to the court below, with directions either to stay proceedings on the filing of a bond by defendant, or to order that judgment be entered only on the filing of a bond by plaintiff, as above suggested.

PAULINE MUELLER v. GRAND GROVE, * * * UNITED
ANCIENT ORDER OF DRUIDS.

April 26, 1898.

Nos. 10,962—(54).

New Trial—Newly-Discovered Evidence—Conflicting Affidavits.

A motion herein for a new trial on the ground of newly-discovered evidence was heard and determined by the trial court on conflicting affidavits. *Held*, that a denial of the motion was not error.

Appeal by defendant from an order of the district court for Hennepin county, Elliott, J., denying its motion for a new trial on the ground of newly-discovered evidence. *Affirmed*.

John H. Ives, for appellant.

W. H. Adams, for respondent.

START, C. J.

The trial in this case in the district court resulted in a decision in favor of the plaintiff awarding her \$1,000 as a beneficiary in a certificate or insurance policy issued by the defendant to the plaintiff's husband, Joseph Mueller. Thereupon the defendant appealed to this court from an order denying its motion for a new trial, and such order was affirmed in this court July 9, 1897. See *Mueller v. Grand Grove*, 69 Minn. 236, 72 N. W. 48. After the case was remitted, and on August 16, 1897, the defendant made a motion for a new trial, solely upon the grounds of newly-discovered evidence of which it was ignorant when the first motion was made. The defendant appealed from an order denying its second motion.

The newly-discovered evidence consisted of alleged admissions of the plaintiff as to her knowledge of her husband's standing in the defendant order, and that she had admitted that she knew he had not paid his dues, and that he was not in good standing, and of alleged admissions by the husband made shortly before his death, to the effect that he had voluntarily withdrawn from the order. The motion was met by the plaintiff by her own and other opposing affidavits, which directly denied that the plaintiff ever made the alleged admissions, and stated facts and circumstances tending

to discredit the affidavits on the part of the defendant to the effect that the husband had made the alleged admissions.

Without going into details, it is sufficient to say that we have considered all of the affidavits upon which the trial court based its order denying the motion, and find the evidence is not only conflicting, but that it clearly indicates that two of the persons who made their affidavits as to the alleged admissions of the plaintiff and her husband are unfriendly to her, and were evidently actuated by a spirit of revenge in making them. The opposing affidavits tend directly to impeach one of the defendant's witnesses and another indirectly. The credit to be given to the respective affiants was a question for the trial court, and the granting or refusing of the motion was a matter largely in its discretion, and we are of the opinion that such discretion was properly exercised.

Order affirmed.

JOHN W. PINCH v. JOHN McCULLOCH.

April 26, 1898.

Nos. 10,990—(97).

Action on Second Mortgage Note—Assumption by Successive Grantees—Defense—Delay in Prosecuting Principal Debtor—Release of Surety—Redemption from Prior Mortgage.

The defendant, by an assumption clause in a deed to him, agreed to pay a first and second mortgage on the land conveyed. Thereafter he conveyed the land, and his grantee assumed and agreed to pay both mortgages, and in turn conveyed it to a third party, who also agreed to pay the mortgages. The first mortgage was foreclosed and no redemption was made. The holder of the second mortgage took no steps to collect the debt secured thereby from either the defendant's grantee or the grantee of the latter, who was solvent for five years after the note became due, and then became insolvent. *Held*, that the holder of the second mortgage was not bound to redeem from the first one; and, further, that his mere passive failure to enforce payment of his debt from such solvent grantee did not discharge the defendant from liability on his promise to pay the second mortgage.

Same—Statute of Limitations—Running of Statute.

Held, further, that the statute of limitations on the defendant's promise began to run from the due day of the debt assumed, and not from the date of the promise.

Appeal by defendant from a judgment upon the pleadings in favor of plaintiff for \$584.44, entered in the district court for Ramsey county pursuant to the order of Kelly, J. Affirmed.

James H. Barnard, for appellant.

J. W. Pinch, for respondent.

START, C. J.

Judgment was ordered and entered herein in favor of the plaintiff upon the pleadings, from which the defendant appealed. The record presents a single question for our determination. It is, does the answer state facts constituting a defense. We answer it in the negative.

This action is to recover from the defendant, upon an assumption clause in a deed to him, the amount of a promissory note for \$383, due December 19, 1891, with interest, and secured by a second mortgage upon real estate executed by the makers of the note to Clark B. Davison. The mortgagors conveyed the mortgaged premises to the defendant, who, in consideration thereof, assumed and agreed to pay the mortgage as well as a prior mortgage on the premises for \$800. The plaintiff is the owner of the note and mortgage in question (which has not been paid) through certain mesne assignments from Davison. Substantially the foregoing are the allegations of the complaint, and they are admitted by the answer.

For a defense the defendant alleges that on March 27, 1890, he conveyed the mortgaged premises by warranty deed, duly recorded, to G. W. Board, who by an assumption clause therein agreed to pay the mortgages; that on November 18, 1890, Board conveyed the mortgaged premises, by warranty deed duly recorded, to the Bank of Superior, which by an assumption clause therein agreed to pay the mortgages; that both Board and the bank are insolvent, but that the bank was able and willing to pay the note down to the close of the year 1896, when it made an assignment for the benefit of its creditors; that the note was never presented to the bank for

payment, and, further, that the \$800 mortgage was foreclosed January 5, 1893, and no redemption made therefrom; that defendant had no notice that the note had not been paid until September 2, 1897. The answer also pleads the statute of limitations as a defense.

1. The defendant claims that this case falls within the settled rule of equity that any laches by the creditor in the care or management of collateral remedies or securities, if loss ensues, will discharge the surety pro tanto. This rule has no application to the facts of this case. When the defendant assumed and agreed to pay the note and mortgage he became, as between him and the makers, the principal debtor, and they the sureties, and in like manner his grantee became the principal debtor, and he a surety, and the grantee of the latter, the bank, became the principal debtor, November, 1890. In other words, from maturity of the note, December 19, 1891, to the close of the year 1896, the defendant was a surety for the debt, and the bank the principal debtor, during which time it was solvent, and would have paid the note if it had been presented for payment, but the principal is now insolvent.

No laches can be charged to the plaintiff or his assignor in not redeeming from the first mortgage. They were not bound to pay it off or redeem from the foreclosure sale. Besides, there is no claim made that the land was worth any more than the first mortgage. The defendant had the right, at any time after the note became due, to pay it, and be subrogated to all the rights of the mortgagee or his assignee to the note and the mortgage securing it, and thereby put himself in a position to redeem from the first mortgage or to enforce payment by the bank. No claim is made that the time of payment of the note was ever extended, and this case is one where the creditor simply delayed enforcing his claim against the principal debtor, who in the meantime became insolvent. Such mere passive failure to pursue the principal debtor does not release the surety. *Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161; *Benedict v. Olson*, 37 Minn. 431, 35 N. W. 10; *Osborne v. Gullikson*, 64 Minn. 218, 66 N. W. 965.

2. This action was commenced September 24, 1897. The defendant's promise to pay the note and mortgage in question was made

February 26, 1890, but the debt which the defendant assumed and agreed to pay was not due until December 19, 1891. If, as the defendant claims, the statute began to run from the date of his promise, this action is barred. But no action could have been maintained against the defendant on his promise to pay the debt until it became due and he had a right to pay it; hence the statute commenced to run from the time the debt matured, December 19, 1891, and this action is not barred.

Judgment affirmed.

STATE OF MINNESOTA v. HENRY HENDERSON.

April 26, 1898.

Nos. 11,032—(16).

Bastard—Witness—False Testimony—Instruction to Jury.

The trial court instructed the jury: "If you have reason to believe that any one of the witnesses who have testified here has testified falsely, you have a right to discredit his testimony entirely." *Held* reversible error.

Defendant appealed from a judgment entered in the district court for Norman county, pursuant to a verdict finding the defendant guilty, and to the findings and order of Ives, J., adjudging the defendant to be the father of a bastard child and chargeable with its support.

W. W. Calkins, N. T. Moen and O. Mosness, for appellant.

R. J. Montague, for respondent.

START, C. J.

This is an appeal by the defendant from the judgment of the district court of Norman county adjudging him to be the father of a bastard child and charging him with its support.

The evidence was ample to sustain the verdict of guilty, and the only errors assigned relate to alleged errors in the instructions given to the jury. The jury were instructed as follows:

"If you have reason to believe that any one of the witnesses who have testified here has testified falsely, you have a right to discredit his testimony entirely; and if you believe a part of his testi-

mony is true and a part is false, you have a right to credit that portion you believe is true and discredit that portion you believe to be false."

The exception was in these words:

"Defendant excepts to that part of the court's charge which substantially charges that if any witness has testified falsely to any matter his entire evidence may be disregarded."

This instruction was error. The maxim "*Falsus in uno, falsus in omnibus*," applies only to cases where the false testimony relates to a material matter and is knowingly and wilfully given. It does not apply to testimony given by mistake or inadvertence, or to immaterial testimony, or to such testimony as may have been corroborated by other credible evidence. 2 Thompson, Trials, §§ 2423-2425. The instruction as given did not so limit the application of the maxim. The true rule is that, if the jury believe from the evidence that any witness has knowingly and wilfully testified falsely to any material fact in the case, they may disregard his entire testimony, except so far as it is corroborated by other credible evidence. The credibility of such a witness is a matter for the jury. They may believe or disbelieve his testimony as to other facts according as they deem it worthy or unworthy of belief. *Schuek v. Hagar*, 24 Minn. 339.

Counsel for respondent practically concedes that the instruction was erroneous, but claims on the authority of *Dallemand v. Janney*, 51 Minn. 514, 53 N. W. 803, that the exception was too general, in that it did not call the attention of the court to the fact that material qualifications were omitted from the instruction as given.

The distinction between the case cited and this case is obvious. In the former case the application of the maxim was expressly limited to testimony as to material facts, the substance of the charge being that, if it was found that any witness had sworn falsely as to any material fact in the case, his testimony might be disregarded unless corroborated by reliable evidence. The only vice in this instruction claimed was the failure to qualify the phrase "sworn falsely" by the words "knowingly or wilfully." The word "falsely," when used with reference to the testimony of a

witness, ordinarily means something more than that the testimony is untrue, and implies that it is intentionally untrue, but the word is also sometimes used in the sense of mistakenly or erroneously. Hence the instruction, in the case relied on, was indefinite, and liable to mislead, and it was correctly held that the attention of the court should have been called to the specific ground of the exception.

But the instruction in the case at bar was not simply indefinite; it was fundamentally erroneous. It declared in effect, as a matter of law, that the entire testimony of a witness, whether corroborated by reliable evidence or not, might be discredited by the jury if they had reason to believe, from the evidence or otherwise, that he had testified falsely to any fact, material or immaterial. The exception to the instruction was sufficient. Respondent further claims that the error was not prejudicial to the defendant. The record does not justify this claim. The error was naturally calculated to prejudice the defendant, and the presumption that it did is not clearly rebutted by the record.

Judgment reversed and new trial granted.

CHARLES D. CAMPBELL and Another v. SAMUEL LOEB.

April 26, 1898.

Nos. 11,020—(100).

Ejectment—Damages—Sufficiency of Evidence.

Evidence considered, and *held*, that it does not sustain the assessment of damages made by the trial court.

Appeal by defendant from an order of the district court for St. Louis county, Ensign, J., denying his motion for a new trial. Reversed, unless plaintiff consent to a reduction of damages.

Pealer & Fesler, for appellant.

Allen, Baldwin & Baldwin, for respondents.

START, C. J.

This was an action in ejectment and for damages for withholding the premises in dispute. The cause was tried by the court, without

a jury. Findings of fact were made in favor of the plaintiffs, wherein the damages were assessed, on the basis of the rental value of the premises for the time they were detained by the defendant, as found by the court, in the sum of \$563.20, and judgment ordered accordingly. The defendant appealed from an order denying his motion for a new trial.

The only question here urged by the appellant on oral argument is that the finding as to the damages is not sustained by the evidence. The respondents claim that the assignments of error are not sufficient to raise the question. Technically, the assignments of error seem to be insufficient; and, conceding the point that they are, we are of the opinion that this appeal ought to be disposed of upon its merits, and that an amendment of the assignments be allowed.

While it is claimed in the complaint that the defendant has withheld the premises from the plaintiffs since July 20, 1894, the trial court found that the detention commenced April 8, 1895, and assessed the damages from the latter date to the commencement of the action. The evidence as to the rental value of the premises is indefinite and unsatisfactory; but, upon the whole record, our conclusion is that the evidence is sufficient to justify a finding that the rental value of the land during the time mentioned in the trial court's findings was \$210 per year. This corresponds with the allegations of the complaint, which charges that such rental value

"Is the sum of two hundred ten dollars, and the plaintiffs have been damaged annually in said amount by the defendant's unlawful withholding" of the land.

The time for which the trial court assessed the damages was practically two years, and, upon the claim made in the complaint and the evidence, the total damages for such time ought not to have been, in any event, more than \$420; hence a new trial must be awarded conditionally. It does not appear that the attention of the trial court was called to the claim made in the complaint as to damages. In view of this fact, and what has been said as to the assignments of error, no statutory costs should be allowed.

Ordered that a new trial herein be granted, unless, within 15 days

after a remittitur is filed in the district court, the plaintiffs file their written consent therein, to the effect that the assessment of damages in the findings of the trial court be reduced to \$420, in which case the order appealed from is affirmed, and judgment may be entered on the findings as so modified; no statutory costs to be allowed either party on this appeal.

JOSEPH A. WRIGHT v. VINEYARD METHODIST EPISCOPAL
CHURCH OF HUTCHINSON.

April 26, 1898.

Nos. 11,057—(107).

Sale—Principal and Agent—Ratification—Sufficiency of Evidence.

Evidence considered, and *held* that it conclusively shows that the defendant ratified the purchase of an organ, made for it by its assumed agent, from the plaintiff.

Appeal by plaintiff from an order of the district court for McLeod county, Cadwell, J., denying his alternative motion for judgment notwithstanding the verdict or for a new trial. Reversed.

J. Van Valkenburg, for appellant.

M. C. Tift, for respondent.

START, C. J.

The complaint herein alleged that the plaintiff on September 1, 1893, sold and delivered to the defendant a church organ, at the agreed price of \$200, no part of which has been paid, except \$7.50, and demanded judgment accordingly. The answer was a general denial, except that it admitted that the defendant was a corporation. Verdict for the defendant, and the plaintiff appealed from an order denying his alternative motion for judgment notwithstanding the verdict, or for a new trial.

The organ was purchased (ostensibly for the defendant) of the plaintiff, at Minneapolis, by the then pastor of the church, Rev. L. W. Ray, and placed in its house of worship at Hutchinson. There is no substantial controversy on this point. But the defendant claimed that Mr. Ray was not authorized to make such contract for

it. The plaintiff claimed that the pastor was so authorized, but, if he was not in fact so authorized at the time he assumed to purchase the organ for the defendant, the defendant subsequently fully ratified his act. These issues were submitted to the jury after the trial court had denied the plaintiff's motion to direct a verdict for him. The verdict is, in effect, a finding that Mr. Ray was not authorized to buy the organ for the defendant, and that it never ratified his act. The plaintiff here claims that the finding is not sustained by the evidence, as to either issue. This raises the only question we need consider.

The evidence is undisputed that the defendant in the year 1893 entered upon the work of rebuilding and refurnishing its church building. For this purpose a building committee was duly appointed, of which the chairman was the pastor, Mr. Ray, who, with the tacit assent, at least, of the committee and the trustees of the church, assumed charge of the work, and of purchasing all necessary materials and furnishings. He ordered from or through the plaintiff, for the defendant, mill stuff, leaded glass, windows, paper, pews, carpets, pulpit, chairs, altar rail and communion table, all of which were afterwards paid for by the defendant. But as to the organ the testimony on the part of the trustees was to the effect that the pastor was never authorized to purchase it. The organ was shipped by the plaintiff shortly before September 1, 1893, consigned to the pastor, and one of the trustees paid the freight on it; and it was placed in the defendant's auditorium at the dedication of the church, September 1, 1893.

There is no dispute in the evidence as to the knowledge of the trustees and all of the officers of the defendant that the organ was so shipped by the plaintiff and placed in the church, but there is a conflict in the evidence as to whether the trustees were informed that the pastor had purchased the organ for the church. But accepting the testimony of the trustees as correct, and basing our decision upon it, we have the following undisputed facts: The organ was received by the defendant, and placed in its church, September 1, 1893. The trustees did not then know that the pastor had purchased it, but they were told that he had ordered it for the dedication services, and the price was \$200 if the church bought it.

The defendant continued to use the organ for several months, and then, some time prior to January 1, 1894, the trustees voted not to buy the organ, but to send it back. But they went on using it, neither notifying the plaintiff of their action, nor returning the organ to him. Some time in the spring of 1894 they again voted as before, and the plaintiff was notified, probably in June; but still they retained and used the organ. Again, in the fall of 1894, they voted as before; and, as before, they retained and continued to use the organ, until about November, 1896 (more than three years in all), when they shipped the organ to the plaintiff, who has never received it.

There can be but one conclusion drawn from these facts, which is that, if Mr. Ray was not originally authorized to purchase the organ for the defendant, its trustees subsequently ratified his acts. It is true that the question whether a principal has by his acts and conduct ratified the unauthorized act of his assumed agent is usually one of fact for a jury; but, upon the undisputed evidence in this case, it must be held as a matter of law that the defendant ratified the act of the pastor, Ray, in purchasing the organ, even if it be conceded that he had no authority in the first instance. A statement of the facts is all that is necessary to say in support of this conclusion. The jury should have been directed to return a verdict for the plaintiff, as requested.

The order appealed from must therefore be reversed, and the cause remanded, with direction to the court below to enter judgment for the plaintiff for the amount claimed in his complaint, notwithstanding the verdict. So ordered.

ANNA RADL v. MICHAEL M. RADL.

April 27, 1898.

Nos. 10,969—(55).

Husband and Wife—G. S. 1894, § 4470—Testamentary Disposition of Homestead—Assent of Survivor Can Be Given after Testator's Death.

The assent in writing, required under the provisions of G. S. 1894, § 4470, of the surviving husband or wife, to a testamentary disposition, at least of a testator leaving surviving children, may be executed and given after the decease of such testator.

Same—G. S. 1894, § 4472—Refusal to Accept Provisions of Will—Application to Devise of Homestead.

Sections 4470–4472, enacted at the same time in relation to the same subject-matter, are to be construed together. *Held*, that the provisions of section 4472, relating to the survivor renouncing and refusing to accept the terms and conditions of a will within six months after the probate thereof, apply to a testamentary disposition of the homestead of a parent, as well as to a like disposition of the land mentioned in section 4471.

Appeal by defendant from an order of the district court for Brown county, Webber, J., denying his motion for a new trial. Reversed.

Somerville & Olsen, for appellant.

Washburn v. Van Steenwyk, 32 Minn. 336; Meech v. Estate of Meech, 37 Vt. 414; Gray v. McCune, 23 Pa. St. 447; Taylor v. Loller (Ky.) 3 S. W. 165; In re Gunyon's Estate (Wis.) 55 N. W. 152; Fosher v. Guilliams, 120 Ind. 172; Chamberlain v. Chamberlain, 43 N. Y. 424, were cited.

John Lind and *Joseph A. Eckstein*, for respondent.

The question in this case is whether the homestead, as defined by statute, not having been disposed of by the concurrent action of husband and wife, is a fixed statutory estate which descends to the children upon the death of the parent, subject only to the life estate of the surviving parent; or whether it is a conditional estate liable to be transmitted as the whim or interest of the surviving spouse

72	81
72	96
72	81
75	55
75	55
75	57
72	81
72	270
72	81
86	93

shall dictate. The argument of appellant is based upon the assumed analogy between the statutory estate in lieu of dower and the statutory estate of homestead. If the analogy does not exist, appellant's argument fails.

Legislation in Minnesota relative to the homestead has advanced step by step. Its present scope was established by the Probate Code of 1889. This enactment goes a step in advance of former legislation on the subject in any state. It not only protects the possession and occupancy of the owner in his lifetime, but it gives to the surviving spouse an estate for life and to the children an estate in fee. It shows the intention of the legislature that the family home shall be inviolate for at least two generations. This is but a reassertion of the Anglo-Saxon instinct for the protection of the home and its perpetuation in the family, which, in an earlier age, found expression in primogeniture and entails. Under the old law the homestead was a temporary provision for the owner and his spouse during their lives and during the minority of their children. Under the present law it is an absolute provision for the family—parents and children—during all stages. Under the old law the fee went to satisfy the demands of creditors of the owner, if required, subject to the life estate of the surviving spouse. Under the present law the fee goes to the children free from such claims.

Any alienation by the owner of the homestead, unless concurred in by the spouse, is void. G. S. 1894, § 5522; *Law v. Burton*, 44 Minn. 482. Such an attempted conveyance of the homestead being absolutely void, a subsequent assent by the spouse in any form to such conveyance would not give it validity, except perhaps where circumstances might create an estoppel. From this it follows that the homestead can be disposed of only by the concurrent act of both husband and wife during their lifetime.

There is no provision in the probate code for the execution of the assent mentioned in G. S. 1894, § 4470, after the death of the owner of the homestead. This is conclusive that the legislature intended that such consent should be given in the lifetime of the owner. Section 4472 provides that the survivor may renounce the will, if dissatisfied with its provisions. But if satisfied with the will, no

act whatsoever is required of the survivor. In other words, non-action under the provisions of section 4472 is an election to take under the will. If appellant's argument is sound, a surviving spouse, in a case where the will disposes of the homestead, divests the children of deceased of their fee in the homestead without doing any affirmative act whatever. How does this harmonize with the language of section 4470, which provides that the fee in the homestead shall descend to the children free from any disposition to which the surviving spouse shall not have assented in writing?

COLLINS, J.

Action in ejectment, the facts being stipulated. By his last will and testament, one Xavier Radl devised his statutory homestead to the defendant, his son, and upon his decease said will was duly filed for probate in the probate court. It was duly allowed November 26, 1894, and on the same day this plaintiff, the widow of the deceased, for whom other provision had been made by the terms of the will, duly executed, acknowledged and caused to be filed in said court an instrument under seal, by and in which she assented to all of the provisions and conditions of the will, and waived and relinquished all claims upon, or rights in, the property or estate of the deceased, except such as had been devised to her.

To determine the case, we are required to construe a portion of the Probate Code, and especially that part of G. S. 1894, § 4470, which provides for the descent of the statutory homestead of a deceased person free from all testamentary disposition, "to which the surviving husband or wife shall not have assented in writing." It is the contention of counsel for the plaintiff that the clause in section 4470 above quoted implies that the assent of the survivor must be given before the decease of the testator in order to become effective, and that under it such assent cannot be made operative, nor can the survivor accept the provisions of the will as to the homestead of the testator by any instrument executed after his decease. The court below construed the statute in accordance with this contention, but we cannot concede this to be the proper construction.

The section from which we have quoted (4470) must be inter-

preted in the light of the common law as it existed prior to the enactment of any statute upon the subject and in connection with two sections (4471, 4472) immediately following. These sections were enacted with 4470, as part of the same Probate Code, treat of the same subject-matter, and therefore all three must be examined together when attempting to ascertain the legislative intent.

At common law the wife was entitled to dower upon the death of her husband, and if he died testate she could elect between the provisions of the will and her dower rights, relinquishing the latter if she chose. It was not required of the wife that she elect during the lifetime of her husband, and we fail to find anything in section 4470, or in any of the earlier statutes upon this subject, which indicates an intent upon the part of the legislature radically to change the common law as to the time the wife shall exercise her choice between her statutory rights and a testamentary disposition of real property. Such intent is not denoted by the construction of the clause nor by the language used. This language, in substance, was first introduced into our statute by Laws 1875, c. 40, an act abolishing estates in dower and by the curtesy, as section 3, and it then applied to lands other than the homestead, the latter being provided for in section 2. Section 3 has been in force since its enactment, and is now section 4471, *supra*, and the clauses in question must necessarily be given the same construction in both sections.

Therefore, if the assent to a testamentary disposition of the homestead must be given prior to the death of the testator, it must also be given prior to such death when lands other than the homestead are disposed of by the last will and testament of a married person. We do not believe that such a construction has ever been placed on section 4471. So to construe the clauses now under consideration, being substantially the same, in sections 4470 and 4471, would render section 4472 wholly nugatory; for in terms it provides that when a parent dies testate, having made provision in a will for a surviving husband or wife, in lieu of a statutory right or interest in the estate of the deceased, the survivor must by an instrument in writing, filed in the probate court within six months after the will is proved, renounce and refuse to accept the pro-

visions made in the will, or such survivor shall be deemed to have elected to take under and in accordance with the terms and conditions of the same. This clearly and conclusively indicates that the right to elect to assent or dissent is given for a period of six months after a will is proven, when children survive the testator. Of course, no good reason can be urged why there should be a difference between cases where there are children and where there are not, except that it is proper, and perhaps essential, that a reasonable period of time should be fixed for the exercise of the right of election, where the interests of children are to be determined in the probate court.

We are satisfied, when considering the provisions of these three sections, that the assent of the surviving husband or wife—the election between the provisions of the will and the statutory rights—may be given and had after the decease of the testator, and that the terms of section 4472 apply to a testamentary disposition of the homestead as well as of other lands. The essential things are: First, a testamentary disposition of the homestead; and, second, an assent to such disposition in writing by the survivor, or a failure to renounce within six months after probate of the will. And nowhere in the statute is it required that this assent be manifested during the lifetime of the testator.

This construction is also one which will the more effectually carry out the purpose of the legislature, which was to protect the survivor, for it gives to him or to her an opportunity to elect or choose to better advantage. If compelled to elect between the will and the statutory rights or interests, during the lifetime of the testator, the choice or election must be made with reference to the then existing condition of the testator's property. The assent is to be given or refused with the knowledge of what then appears for the best, and it also, especially in the case of a wife, may be largely influenced by the wishes or demands of the testator. It may not be the free and untrammelled act of the person who assents to a testamentary disposition of the homestead or other real estate. But, if the choice is once made, the assent given and statutory rights relinquished, the act cannot be rescinded, no matter what may thereafter occur to make it desirable.

For illustration, is it not a matter of common observation that within a few years, during the period of financial embarrassments and great losses, vast estates have been swept away in business ventures, and wealthy men very much reduced in circumstances? During the prosperous years estates seemed large, and many a wife would readily have assented to a testamentary disposition of the homestead, depending upon other provisions made for her in lieu thereof and out of other property, which in case of financial difficulty would have to be used in payment of debts. If compelled to accept the conditions of a last will and testament while the husband was living, many a wife would upon the settlement of his estate find that she had made a great mistake. If, upon the other hand, she is free to act when the will is offered for probate, to renounce or to accept, she can act advisedly and without restraint, at a time when the exact condition of the estate can be easily and definitely ascertained, and when the survivor can best determine what is for his or her best interest. If for no other reason, sound policy seems to demand the adoption of our views upon this question.

Counsel for plaintiff urge that under our construction of the statute it is optional with the survivor to deprive the children, if any there are, of their remainder in the homestead; but the option exists no matter how the statute is construed, and the only question is as to when it shall be exercised, before or after the testator's death. The time of the performance of the act is of no consequence to children, for it is the act itself which affects them. The plaintiff was not entitled to possession of the real property in litigation. She not only omitted to renounce and refuse to accept under the will, but in writing, under seal, duly acknowledged and filed in the probate court on the day the will was proved and allowed, she absolutely and unqualifiedly assented to the testamentary disposition of the homestead, and accepted the provisions made in the will for her benefit, in lieu of the statutory rights and interests.

Order reversed.

STATE OF MINNESOTA v. ROBERT P. LEWIS COMPANY.

April 27, 1898.

Nos. 10,986—(35).

72	87
77	817
77	818
72	87
82	392
82	403
82	404
72	87
184	54

Sp. Laws 1885, c. 110, § 26—Municipal Corporation—Water Frontage Assessment Law—Constitution.

Section 26, c. 110, Sp. Laws 1885, generally known as the water-frontage tax or assessment law, is not unconstitutional or void on the ground that it applies a uniform rate of assessment as to all lands within the city limits.

Same—Power of Legislature—Rate per Front Foot.

The legislative power in respect to taxation was properly exercised when the rate of assessment, annually, at ten cents per lineal foot of frontage, was arbitrarily fixed in said section, and the city authorities were compelled to make such assessment.

Same—Interpretation of Law—"Lot"—Unoccupied Pasture Land.

The word "lot," found in said section 26, is synonymous with the word "tract" or "parcel." A tract or parcel of land of 65 acres, abutting on streets on three sides, and alleged to be "vacant, unoccupied pasture land," is assessable, under the statute, when water pipes or mains have been laid in the streets opposite the same.

Same—Conduit to Conduct Water to City.

Nor can it escape assessment and taxation under said section upon the sole ground that the water pipe is a conduit placed in the street for the purpose of conducting water into the city. Nor upon the sole ground that the city authorities have denied the owner the privilege of having it tapped for the purpose of supplying the land with water.

Same—Unplatted Property—Method of Assessment.

The land in question abutted on Front street on the south for 630 feet, and abutted on Dale street on the west for over 2,000 feet. The authorities, when making the assessment, treated and considered the tract as if 150 feet of the south end had been platted and subdivided into lots fronting on Front street, and assessed the tract for 630 lineal feet on account of a water pipe theretofore laid in that street. They then deducted 150 feet from the frontage upon Dale street, and assessed for the number of lineal feet remaining, on account of a water main then on that street. Held to be erroneous, upon the ground that, if any part of the land was treated and considered as platted, for the purpose of assessing frontage upon both streets, the whole should have been so treated and considered;

and further that, if the tract is to be assessed as if platted, the owner is entitled to such deductions as would have to be made on account of streets intersecting Front and Dale if the tract was actually platted.

In proceedings in the district court for Ramsey county to enforce the payment of delinquent real-estate taxes for the year 1895, judgment upon the pleadings was ordered for the plaintiff against certain land owned by the Robert P. Lewis Company, and the case certified to the supreme court, by Willis, J. Modified.

Daniel W. Doty, for objecting landowner.

The water-frontage assessment act is unconstitutional under Const. art. 9, § 1, not because it provides for a frontage tax, but because it applies a uniform rate of taxation to densely-populated city lots and to farm lands, and necessarily results in inequality. *Noonan v. City of Stillwater*, 33 Minn. 198; *State v. District Court of Hennepin Co.*, 33 Minn. 235. In Pennsylvania, under a provision of the constitution that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," it has been decided that the frontage rule cannot be applied where the improvement is made through rural or suburban districts, and that an act providing for it is unconstitutional. *Seely v. City of Pittsburgh*, 82 Pa. St. 360; *City v. Rule*, 93 Pa. St. 15; *Keith v. City of Philadelphia*, 126 Pa. St. 575; *Craig v. City of Philadelphia*, 89 Pa. St. 265. So also in other states. *Thomas v. Gain*, 35 Mich. 155; *Tide v. Coster*, 18 N. J. Eq. 518.

Even if the act were valid, it is contended that the water board did not comply with its provisions in making the assessment for the reason that, although in fact unplatted, the land was treated by the water board as if in part platted, and in part unplatted. The land should have been treated either as wholly unplatted or as wholly platted. An assessment made upon a rule other than prescribed by statute is not valid. *State v. District Court of Ramsey Co.*, 29 Minn. 62. Furthermore the pipe on Dale street was placed there solely for the purpose of introducing water into the city, and it was and still is a conduit and not such a pipe as is contemplated by section 26. The land on Dale street was in no respect benefited

by the laying of the pipe, and it is therefore not a local improvement within the meaning of Const. art. 9, § 1, as construed in *State v. Reis*, 38 Minn. 371.

S. A. Anderson and F. W. Zollman, for plaintiff.

The Minnesota cases cited by counsel for the owner are not in point, for they did not construe the particular law here in question, namely, the amendment of 1881 providing for the water frontage tax. Neither has counsel cited a single case from any other state in which there exists a constitutional provision similar to that of Minnesota, so that none of the cases relied upon as authority for his contention are analogous. As a matter of fact, the decisions of the courts for those states in which he claims to find authority for his contention have all upheld the correctness of a frontage tax, and the propriety of assessing lands of a rural character for municipal purposes. *Kelly v. City of Pittsburgh*, 85 Pa. St. 170, 104 U. S. 78; *Thomas v. Gain*, 35 Mich. 155, 161; *Northern v. Connelly*, 10 Oh. St. 160; *Knowlton v. Board of Supervisors*, 9 Wis. 410; *Taber v. Grafmiller*, 109 Ind. 206; *Leeper v. City of South Bend*, 106 Ind. 375. Municipal taxation of agricultural lands is also sustained in *Cary v. City of Pekin*, 88 Ill. 154; *City of Santa Rosa v. Coulter*, 58 Cal. 537; *Town of Dixon v. Mayes*, 72 Cal. 166; *Turner v. Althaus*, 6 Neb. 54; *Martin v. Dix*, 52 Miss. 53.

COLLINS, J.

This is a certified case, under the provisions of G. S. 1894, § 1589; and among other questions involved is that of the constitutionality of Sp. Laws 1885, c. 110, § 26, generally known as the water-frontage tax or assessment law.

The land against which judgment was ordered in proceedings to enforce the collection of taxes delinquent for the year 1895 is within the city limits and comprises about 65 acres. Dale street is on the west of this tract, the abutting line being 2,580 feet in length. Its south line abuts on Front street for a distance of 630 feet. On the north of the tract is Maryland street.

A water main was laid on Dale street in 1884, opposite this land, for the purpose, according to the answer, of conducting water into the city for the use of its inhabitants, and in 1887 a water pipe was

laid on Front street; but no effort was made to enforce a collection of any frontage tax prior to these proceedings. Then the authorities assessed a tax of ten cents per lineal foot for 2,230 lineal feet of frontage upon Dale street, and for 630 feet upon Front. There were deducted from the said frontage of 2,580 feet upon Dale street 200 feet, on account of a railway which crossed it as well as the land; and also 150 feet at the intersection of that street with Front. In other words, the assessment was made as if lots 150 feet deep had been laid out from Dale street easterly, all facing south upon Front. The defendant owner objected by answer to the entry of judgment for any part of this frontage assessment, and the court below, overruling the objections, ordered judgment for the full amount claimed.

1. It is contended by counsel for the owner that section 26, *supra*, "Is unconstitutional and void under art. 9, § 1, of the constitution of Minnesota, because it applies a uniform rate of taxation to densely-populated city lots and to farm lands, and necessarily results in inequality."

It is not urged that the act is opposed to the constitution simply because it provides for a frontage tax, but because the same rate of taxation (ten cents per lineal foot of frontage) is applied indiscriminately to the two classes of real property before mentioned, without regard to benefits derived.

In support of this position, counsel cites two cases (*Seely v. City of Pittsburgh*, 82 Pa. St. 360, and *Keith v. City of Philadelphia*, 126 Pa. St. 575, 17 Atl. 883) in which it was held that a frontage rule which blended town and country, city lots and farm lands, wholly failing to distinguish between them, could not be sustained under a constitutional provision that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax,"—a provision not differing materially from that found in our constitution as originally adopted, and now the first paragraph of section 1 of article 9. The subsequent paragraphs or provisos in that section have been added by amendment,—the first, respecting assessments for local improvements, in 1869; the second, authorizing a frontage tax, in 1881; and the third, providing for the taxation of inheritances, in 1894.

We have first to inquire whether the statute (section 26, *supra*) is within the second proviso of section 1, art. 9, of the constitution, whereby, for the purpose of defraying the expense of laying water pipes and supplying any city or municipality with water, the legislature was given the power by general or special law to authorize any such city or municipality having a population of 5,000 or more to levy an annual tax or assessment upon the lineal foot of all lands fronting upon any water mains or water pipes laid by such city or municipality within the corporate limits for supplying water to the citizens thereof, without regard to the cash value of such property, and to empower the collection of such tax or assessment. The statute closely follows the language of the constitution, and it is to be noticed that the amount of the annual tax or assessment is fixed at ten cents per lineal foot of frontage, and further that the provision is mandatory upon the board of water commissioners. It is well settled that:

"The legislature possesses plenary power over the subject of taxation, except so far as it is restricted by the constitution of the state, or by contract entered into by it, the obligation whereof cannot be impaired, and except so far as it is limited by the constitution of the United States. Except as thus restricted, the power of the legislature as to the mode, form and extent of taxation is unlimited, absolute and uncontrolled, where the subjects to which it applies are within the territorial jurisdiction of the state." 1 Desty, Taxn. § 24.

The only restriction upon the power of the legislature as to the mode and form of the taxation being that imposed by the constitution, it was proper for the legislature arbitrarily to fix the rate per lineal foot, and also to compel the authorities to make the assessment. And assessments for paving, and for like purposes, made in proportion to the frontage of the lands abutting on the improvement, are not an uncommon method adopted for the purpose of collecting and defraying the expenses of such improvements. As was said in the case of *Thomas v. Gain*, 35 Mich. 155, 161,

"The idea that underlies statutes for this purpose is, that the benefit to the abutting lots is generally in proportion to the length of their respective fronts, and that as a rule this principle of apportionment is more just than any other. There is a basis of

truth to this idea, and it is so generally accepted that assessments for street improvements are perhaps now more generally apportioned by the frontage than by any other standard."

See, also, *Northern R. Co. v. Connelly*, 10 Oh. St. 160.

The constitution expressly provides that the frontage tax or assessment may be made on all lands fronting upon such mains or pipes as may be laid by cities or other municipalities, and without regard to the cash value of such lands. And this is what was directed to be done by the statute under which these proceedings were had,—nothing more. The statute is not open to the objection made.

2. It was alleged in the answer that the property in question was "vacant, unoccupied pasture land"; and it is argued that for this reason it does not fall within the statute, which provides for the assessment "upon each and every lot" in the city, in front of which mains or pipes are laid. Counsel concedes in his brief that property used or likely to be used for urban purposes may be thus taxed, because it may be supposed to have some use for water. But he urges that governmental subdivisions of rural farm land, which cannot possibly be benefited, are not within the statute.

But the allegation that the land is "vacant or unoccupied," or that it is "pasture," is altogether different from the claim that the tract is "rural farm land." The latter, while within the city limits, might be suburban in every respect; but the former could easily be urban, under the strictest definitions. Vacant, unoccupied pasture land might be used for urban purposes. It might be in a well-settled portion of a city, and very desirable for city uses. The word "lot," as found in section 26, is not restricted in its meaning. It is synonymous with the word "tract" or "parcel." The answer fails to show that defendant's land is not a lot, within the meaning of the statute.

3. We now come to a consideration of the method or system of assessment. As before stated, a tract of land 150 feet deep, facing to the south on Front street, was treated and considered as if lots of that depth, and so facing, had been platted on the south end of the 65 acres, and assessed ten cents per lineal foot on account of the pipe laid on that street. Then the balance of the tract was treated

and considered as fronting upon Dale street, and assessed at the same rate for 2,230 feet; that is, to the north line of the tract,—a deduction from the real frontage being made, as before stated.

This method or system of assessment was erroneous. The authorities would have no right to treat or consider a part of the land platted for the purpose of assessment, and then to treat or consider the balance unplatted for a like purpose. If the tract, or any portion of it, could be regarded as facing or fronting upon both streets for the purposes of frontage assessment, it must be upon the theory that a proper subdivision or platting would result in facing or fronting lots upon each street. If this be so, and the owner is compelled to accept this theory, with all of its burdens, he is also entitled to all of the benefits which would result if the subdivision or platting had actually been made. The tract cannot be regarded as partly platted and partly unplatted. If any portion is treated and considered as if laid out into lots, all must be. The owner must not be placed in a worse position by the method and system of assessment than he would have been had he actually platted the tract himself. And yet this is the result of the assessment made. No deduction was made from the frontage upon either Dale or Front streets on account of streets which would have been dedicated to the public over and across this tract of land, had it been in fact platted, and on account of which deduction from the total frontage would have been made. When making the assessment upon the basis of frontage upon both streets, the fact that there would necessarily be intersecting streets of ordinary width, between which there would be lots and blocks of ordinary size, should not have been overlooked, but proper deductions should have been made.

4. It is contended that from the answer it clearly appeared that the pipe on Dale street is a conduit placed there solely for the purpose of conducting water into the city, and further that it stands admitted that the city has refused to allow this pipe to be tapped for the purpose of supplying the tract of land with water. If it is a conduit, it was none the less a water pipe, within the meaning and purpose of the statute; and the fact that the authorities have denied the landowner any privilege which is his under

the law is not available as a defense to this assessment. The owner has an ample remedy if his legal rights have been invaded.

5. The important questions in this case having been discussed, and the case disposed of on the merits, it is ordered that the cause be remanded to the court below, with instructions to reduce the assessment by making proper allowances for streets which would necessarily be laid out over and across the land, and intersect both Dale and Front streets, if the same were platted and subdivided into lots and blocks of ordinary sizes fronting upon said streets. In all other respects the assessment stands affirmed.

MITCHELL, J. (dissenting).

It stands admitted that where a lot fronts or abuts on two streets, and water pipes are laid on both streets, the universal practice in St. Paul is to assess it only for the distance it fronts or abuts on one street. As I understand them, counsel for the city and county concede that this is the proper method of assessing the frontage tax for water pipes.

Assuming this to be correct, I do not think the city has any right to assess this tract for frontage on both Dale and Front streets, or (at least, under the facts of this case) to treat it as subdivided into imaginary lots or tracts. As held in the opinion of the court, the word "lot" is synonymous with "tract" or "parcel." It stands admitted that the land is unplatted, and is all used as one tract, for purposes of pasturage; and there is no suggestion that it is so held and used for the fraudulent purpose of avoiding payment of its legitimate share of taxes and assessments.

Under such circumstances, I do not think the city has any more right to cut up the tract into imaginary lots, for purposes of assessment, than it would have to do so in the case of any other lot or tract which the city authorities think the owner has not subdivided into as small tracts as he ought to have done. My view, therefore, is that this tract should have been assessed only for its frontage on one street; and it necessarily follows from this that the landowner is not entitled to any deduction on account of possible future streets, when he shall, if ever, subdivide the land into smaller lots or tracts.

I concur in the opinion of the court as to the constitutionality of the statute, and as to the liability of this tract to assessment for a water-frontage tax.

JOSEPH A. ECKSTEIN v. MICHAEL M. RADL.

April 27, 1898.

Nos. 10,995—(134).

Will—Devise of Homestead—Liability for Debts of Testator.

Under the terms of G. S. 1894, § 4470, a testamentary disposition of the statutory homestead, assented to in writing by a surviving husband or wife, will not render the property liable to the satisfaction of the debts of the testator.

Appeal by plaintiff, as administrator with the will annexed of the estate of Xaver Radl, deceased, from a judgment entered in the district court for Brown county in favor of the defendant pursuant to the findings and order of Webber, J. Affirmed.

John Lind and *Jos. A. Eckstein*, for appellant.

Somerville & Olsen, for respondent.

COLLINS, J.

This was an action in ejectment brought by the administrator with the will annexed of the estate of Xaver Radl, deceased,—which will was involved in *Radl v. Radl*, supra, page 81,—against the same defendant, and to recover possession of the same property, the homestead of the deceased in his lifetime. We held in that case that the written assent of the surviving husband or wife to a testamentary disposition of the homestead, required under the provisions of G. S. 1894, § 4470, need not be executed or given until after the decease of the testator; and, further, that the provisions of section 4472, relating to the renouncement of a will and a refusal on the part of the survivor to accept its terms and conditions, apply to a testamentary disposition of the homestead as well as to a like disposition of the estate mentioned in section 4471. The conclusion was that the plaintiff in that action, widow of the deceased, could not recover.

Here the contention is that, for the purpose of paying debts which have been proved and established against the estate, the administrator is entitled to possession of the premises, and to recover rents and profits while defendant has been in possession. We quite agree with the trial court that the devise of a homestead does not render it subject to any liability for the payment of a devisor's debts.

When living, the owner may sell and convey the homestead, or he may make a fraudulent transfer of the same, and such sale, conveyance or transfer does not render the property liable for his debts. It is absolutely exempt. The effect of section 4470 is to allow a homestead to descend or to be devised as therein provided, free from all claims on account of indebtedness. The election of the surviving husband or wife to take under the will in such a case does not affect the creditors, or take from them any assets out of which they are entitled to have their claims satisfied. The written assent of a surviving husband or wife to a testamentary disposition of the property has no effect upon the exemption, and cannot be regarded as rendering the same liable for the satisfaction of the devisor's debts.

Judgment affirmed.

GEORGE V. BURGESS and Another v. E. D. GRAFF.

April 27, 1898.

Nos. 11,049—(224).

Sale—Action for Price—Principal and Agent—Findings of Fact.

Held, that the findings of fact herein did not justify the conclusion of law by which judgment was ordered in plaintiff's favor.

Action in the municipal court of Duluth to recover \$115.20, a balance claimed to be due for labor and material furnished by plaintiffs. From a judgment for \$30.67 in favor of plaintiffs, entered pursuant to the findings and order of John H. Boyle, Special Judge, defendant appealed. Reversed.

White & McKeon, for appellant.

A. E. McManus, for respondents.

COLLINS, J.

Giving full effect to the findings of fact in this action, they do not support the conclusions of law. According to these findings, the goods (electric fixtures) were furnished and the work was performed at the request of one P. M. Graff, who was the actual owner of the building in question. The legal title to the property was in the defendant, who resided in Pennsylvania, but this title was merely held as security for a debt due and owing from said P. M. Graff to defendant. The former was in possession, and had been for a long time. He collected the rents, paid all the help, and contracted for all repairs. The defendant had never been in possession, and there was no evidence tending to show that he had ever authorized said P. M. Graff to purchase goods or to employ labor on credit on his account, or that he had ever given apparent authority to said Graff to act as his agent for any such purpose.

The account in dispute was charged upon plaintiffs' books to said P. M. Graff, with other items of goods sold to and work performed for him elsewhere. No part of it was ever charged to defendant. When the entire account, as charged upon the plaintiffs' books, became due, P. M. Graff gave to plaintiffs, and they accepted, his note for a part of the same. He failed to pay this note, and afterwards gave another, for a larger sum. This he failed to pay.

No valid claim against defendant can be based upon such findings, for they fail to show any authority, apparent or otherwise, conferred upon said Graff, under which he could make the purchase of goods, or employ labor, on credit or otherwise. There was a total absence of any finding on which could be based a claim that Graff had apparent authority to act as defendant's agent in this transaction.

Judgment reversed, and a new trial granted.

JOSEPH E. MURPHY v. AUGUSTUS HOLTERHOFF and Another.

April 27, 1898.

Nos. 11,065—(114).

Appeal—Sufficiency of Return—Hospes v. Northwestern M. & C. Co., 41 Minn. 256, Applied.

Rule laid down in *Hospes v. Northwestern M. & C. Co.*, 41 Minn. 256, as to the requisites of a return to this court, applied on an appeal from an order of the district court discharging a garnishee.

Appeal by plaintiff from an order of the district court for Ramsey county, Willis, J., discharging the Germania Bank of St. Paul as garnishee. Affirmed.

C. W. Ney, for appellant.

Stiles W. Burr, for respondents.

PER CURIAM.

From an order discharging a garnishee, and based upon all files, records and proceedings in the action, plaintiff appeals. The return to this court contains nothing more than copies of the affidavit for garnishment, the garnishee summons, an original and supplemental report of the referee appointed to take the disclosure, an order to show cause why the garnishee should not be discharged, the order appealed from, and the notice of, and bond on, appeal, certified to by the clerk of the district court.

The return is clearly defective, under the rule laid down in *Hospes v. Northwestern M. & C. Co.*, 41 Minn. 256, 43 N. W. 180, and frequently applied in later cases. It has not been made to appear affirmatively, either by the certificate of the judge making the order, or by the certificate of the clerk of the court below, that there are before this court all of the files, records and proceedings in the action on which the order was predicated, according to the recital therein found.

Order affirmed.

FREDERICK R. FULTON and Another v. TOWN OF ANDREA.

April 27, 1898.

Nos. 11,097—(188).

Motion for Judgment—Order Denying Motion Not Appealable—G. S. 1894, § 6140.

An order denying plaintiff's motion in the district court for judgment in his favor, made upon the summons, pleadings, findings of fact, decision of this court upon appeal from a judgment in defendant's favor reversing the same upon the ground that on such findings plaintiff was entitled to judgment, and remittitur, is not appealable under any of the subdivisions of G. S. 1894, § 6140.

Appeal by plaintiffs from an order of the district court for Wilkin county, C. L. Brown, J., denying a motion for judgment in their favor. Dismissed.

Ezra G. Valentine and Burke Corbet, for appellants.

Haupt & Baxter, for respondent.

PER CURIAM.

After the reversal of a judgment for defendant in this cause (70 Minn. 445, 73 N. W. 256), plaintiffs' counsel moved the district court, upon the summons, pleadings, findings of fact, decision of this court and remittitur, for judgment in favor of his clients, and against the defendant town, for the amount claimed in said summons. This appeal is from an order denying the motion.

Such an order is not appealable under G. S. 1894, § 6140, for it is not within any of the subdivisions thereof. We can concede that upon the findings of fact the plaintiffs were entitled to have judgment rendered in their favor, and could have compelled the entry of judgment, unless the court below, upon proper application, had seen fit to grant a new trial; but this does not render the order appealable. Its appealability is determined by the statute. This question was not raised in *Babcock v. Murray*, 61 Minn. 408, 63 N. W. 1076, as it might have been.

Appeal dismissed.

THOMAS H. CALEY v. J. N. ROGERS and Wife.

April 27, 1898.

Nos. 11,124—(115).

Forcible Entry and Detainer—Tenant Holding after Rent Becomes Due—Right of Action—G. S. 1894, § 6118—Notice to Quit.

Where a tenant holds over leased premises after rent becomes due according to the conditions of the lease, the right of action, under G. S. 1894, § 6118, is complete. Notice to vacate the leased premises is not necessary.

Justice of the Peace—Adjournment for One Week—Jurisdiction.

In such an action, and when the pleadings were closed, the justice of the peace adjourned the hearing one week, by consent of both parties. *Held*, that the justice did not lose jurisdiction of the cause by such adjournment.

Appeal by defendants from an order of the district court for Mille Lacs county, Baxter, J., denying a motion for a new trial. Affirmed.

J. N. Rogers, for appellants.

Charles Keith, for respondent.

COLLINS, J.

This was an action under the provisions of G. S. 1894, c. 84, § 6118, brought by a landlord against his tenants (husband and wife), who had failed to pay rent as it became due. From a judgment of restitution in justice's court, defendants appealed to the district court, upon questions of both law and fact; and the appeal here is from an order denying their motion for a new trial, made subsequent to the filing of findings of fact, upon which was based a conclusion of law directing that judgment be entered in plaintiff's favor. From the findings of fact, all of which are supported by the evidence, it appears that the defendants were tenants at will, at an agreed rental of \$12 per month,—each month's rent being payable in advance,—and that they had been in default for non-payment of rent about two months when this action was commenced.

1. There is nothing in the contention that the notice to vacate,

served upon the tenants, was insufficient. A notice to vacate was unnecessary. Section 6118, *supra*, expressly provides for the bringing of the action whenever a tenant holds over after rent becomes due according to the terms of the lease, and that in such cases, upon complaint made, a justice of the peace may proceed to hear, try, and determine the same in the manner provided by preceding sections of the same chapter. If the tenant holds over after the rent becomes due according to the terms of the lease, the right of action is complete. Nothing more, and no other thing, is required by the statute. *Spooner v. French*, 22 Minn. 37. G. S. 1894, § 5873, has no application to the facts in this action.

2. When the pleadings were closed, July 19, the hearing of the cause was, by agreement of the parties, adjourned for one week, or until July 26; and the point is made by counsel for defendants that by an adjournment for more than six days the justice lost jurisdiction, and that all proceedings thereafter had were void. There is no merit in this claim. By section 6114 of said chapter 84, discretionary power is conferred upon a justice to adjourn a hearing had under that chapter for a period of time not exceeding six days. This is a limitation upon his discretionary powers, except where causes are brought within the subsequent provisions of the same section. But there is nothing in this language, nor is there anything elsewhere in the chapter, which, by implication or otherwise, forbids an adjournment of the hearing by consent of parties. In *West v. Berg*, 66 Minn. 287, 290, 68 N. W. 1077, it was said:

“It is entirely competent for the parties in an action in justice’s court to agree, subject to the approval of the court, when the pleadings shall be filed, and to what time cases shall be adjourned, without affecting the jurisdiction of the justice.”

While that language was used in reference to an ordinary action in justice’s court, it is equally as pertinent in an action brought under the provisions of chapter 84.

3. We are of the opinion that other questions raised by the assignments of error need no special consideration.

Order affirmed.

O. J. WEIDA v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
COMPANY.

April 27, 1898.

Nos. 11,138—(94).

**Carrier—Order to Furnish Cars—Construction—Verdict Sustained by
Evidence.**

Held, that the verdict, based upon plaintiff's contention as to the proper construction to be placed upon plaintiff's written order for cars, delivered to and accepted by one of defendant's station agents, was justified by the evidence.

Appeal by defendant from an order of the district court for Houston county, Whytock, J., denying a motion for a new trial. Affirmed.

The order referred to in the opinion, which was sent to defendant's station agent, Lyman, at Caledonia, was in the following form: "Lyman, I want to ship 2 cars pig tomorrow (30 ft.) 1-24-96. Answer. O. J. Weida."

Duxbury & Duxbury, for appellant.

E. H. Smalley, for respondent.

COLLINS, J.

The principal question upon the trial of this action was the construction to be placed upon a somewhat crude written order given by plaintiff to defendant's station agent at Caledonia for cars in which to ship hogs over defendant's line of railway to Chicago. The order was accepted by the agent, but, according to plaintiff's interpretation of the same, the cars ordered were not furnished.

From Caledonia to Reno, about 14 miles, the railway is narrow gauge, and from Reno it is of the standard gauge; rendering it necessary to transfer all freight at the station last named. It seems to be conceded that one standard-gauge freight car will receive and carry the contents of two of the cars used upon the narrow-gauge road, and it was plaintiff's contention at the trial that his order, which was for two cars, should have been understood and construed by the agent as calling for four of the narrow-

gauge variety, for loading at Caledonia, and two of the standard gauge at Reno. The contention of defendant seems to have been that but two of the narrow-gauge cars were ordered, and two only were furnished.

On the trial there was evidence tending to show that defendant's agent had, long prior to the giving of the order, instructed plaintiff to order standard-gauge cars, and that it was well understood between him and the agent that when cars were ordered the number specified always referred to those of standard gauge, not to those in use upon the narrow-gauge road, and also that prior orders given by plaintiff had all been construed as calling for the larger cars; in fact, that the uniform custom had been for plaintiff to state the number of cars needed by him, and for the agent to furnish double the number at Caledonia, and the exact number at Reno, when that place was reached. The evidence was ample to support a verdict based, as this was, upon plaintiff's contention as to the construction to be placed upon the order as to the number of cars needed at Caledonia.

Counsel for appellant argue several assignments of error, relating chiefly to the admission or exclusion of evidence. All have been examined, but none seem to require special mention.

Order affirmed.

I. L. ELWOOD MANUFACTURING COMPANY v. CHARLES BETCHER.

April 27, 1898.

Nos. 11,149—(77).

Account Rendered—Retention without Objection—Acquiescence.

Where a party indebted on an account receives a statement thereof, and retains it beyond such time as is reasonable under the circumstances, without objection, he is considered to have acquiesced in its correctness.

Verdict Sustained by Evidence.

Held, that the verdict herein was supported by the evidence.

Appeal by defendant from a judgment of the district court for

Goodhue county, in favor of plaintiff for \$352.23, entered in pursuance of the findings and order of Williston, J. Affirmed.

Albert Johnson, for appellant.

S. J. Nelson, for respondent.

COLLINS, J.

Even if we should concede the claim made by counsel for defendant that from the language used in plaintiff's letter, quoting prices of wire nails, it could not be determined whether the \$1.75 rate therein stated referred to a keg, or to 100 pounds, or to a car load of such nails, there was sufficient evidence adduced upon the trial to support the findings of the court as to the value and the prices at which the nails were sold and delivered by plaintiff to defendant, and as to the balance due after deducting the amounts admitted to have been paid on account.

The goods—wire and wire nails—were sold August 17, 1895, on 60 days' time, and defendant admits that he received them soon afterwards. At the time of sale, plaintiff rendered an account to defendant, in which the number of kegs was stated, the rate fixed at \$1.75 per keg, the percentage added for each keg of the higher priced quality, and the total sum due on account of the nails separately and distinctly set forth. No objection was made to the prices thus fixed until this action was brought, about one year after the sale; and in the meantime defendant had made two payments upon the same. He kept the account rendered at the time of the sale without questioning its correctness for nearly one year, and at plaintiff's request produced it at the trial.

When a party indebted on account receives a statement thereof, and retains it beyond such time as is reasonable under the circumstances, without objection, he is considered to have acquiesced in its correctness. 1 Am. & Eng. Enc. (2d Ed.) 410, and cases cited. See, also, *Robson v. Bohn*, 22 Minn. 410. It is quite evident that defendant did not object to the bill rendered within a reasonable time. In addition to this, it was shown upon the trial, without contradiction, that when plaintiff's counsel presented the account to defendant, before bringing this action, the latter offered to settle by giving his note for the balance alleged to be due. This amount-

ed to an admission that the account as presented was correct. The evidence being conclusive in support of the findings as to the price agreed upon per keg, independently of that admitted against defendant's objection, he was not prejudiced by it, even if the rulings complained of were all erroneous.

Judgment affirmed.

JOHN W. CLARY v. DENNIS O'SHEA.

April 28, 1898.

Nos. 10,860—(43).

72	105
72	296

Action—Adverse Claims—Service by Publication—Misnomer of Defendant O'Shea.

The title to the real estate in question appeared of record to be in "John O'Shea." This plaintiff brought an action against "John O. Shea," to determine adverse claims to the land, and served the summons by publication. *Held*, it cannot be presumed that "O'Shea" and "Shea" are one and the same person, and the facts above stated do not show that plaintiff is the owner of the land.

Taxes—Notice of Expiration of Time to Redeem—Ambiguity in Date.

The land was sold for taxes May 7, 1888. The notice of expiration of redemption stated that fact, and further stated that the time for redemption "will expire on the 7th day of May, 1891, or 60 days after the service of this notice." The notice was served January 3, 1891. *Held*, the notice stated that the time to redeem would expire on two different dates, and was therefore uncertain, ambiguous and void.

Writing—Secondary Evidence—No Notice to Produce.

Plaintiff offered evidence to prove that a certain written contract was made by the parties, was then in the possession of the defendant, and, without having given any notice to defendant to produce the same at the trial, offered to prove its contents by secondary evidence. Defendant objected, and denied that any such instrument had ever existed. *Held*, such denial did not excuse the want of such notice.

Parol Promise to Pay Rent—Possession—Consideration.

A parol promise by one in possession of land to pay rent to one out of possession, who has neither title nor right of possession, is void for want of consideration, and cannot be invoked as an estoppel in favor of a landlord, as against a tenant.

Appeal by plaintiff from an order of the district court for Nicollet county, Webber, J., denying a motion for a new trial. Affirmed.

C. R. Davis and *Thos. Hessian*, for appellant.

John Lind and *A. A. Stone*, for respondent.

CANTY, J.¹

This is an action of ejectment. On the trial the court ordered a verdict for defendant, and, from an order denying a new trial, plaintiff appeals.

1. Plaintiff offered in evidence a patent from the United States to one "John O'Shea," and the judgment and judgment roll in an action brought by plaintiff to determine adverse claims to the property in question. The court refused to receive the evidence, and this is assigned as error.

The defendants named in the summons in that action are "John O. Shea and also all other persons or parties unknown," etc. The only service obtained was by publication, and the names of the defendants appear in the same form in the printed copy of the summons and notice of lis pendens contained in the proof of publication. In the judgment and order for judgment the name is written "John O Shea," which is in the same form except that the period is omitted after the "O." In our opinion, it cannot be presumed that "John O'Shea," named in the patent, is the same person as "John O. Shea," named in the summons and proof of service thereof in that action. "O'Shea" and "Shea" are not the same name. The person on whom the summons was to be served by constructive service was selected from all other persons in the world by the name alone, and that name was "Shea." Thus, it does not appear that the judgment is against the person named in the patent. Therefore the judgment did not constitute a link in a chain of title to plaintiff. Plaintiff did not connect himself with the patent, and the court did not err in rejecting the evidence.

2. We are also of the opinion that the court did not err in rejecting the proof offered to show that plaintiff had become the owner of the land by reason of two tax sales (each under a tax judgment) and the notice of expiration of the time to redeem under each sale.

¹ BUCK, J., did not sit.

Each notice states two dates on which the time to redeem will expire, and is, in our opinion, so uncertain and ambiguous that it is void. One of these notices is, so far as here material, in the following form:

"You are hereby notified that pursuant to the tax judgment entered in the district court in the county of Nicollet, state of Minnesota, on the 21st day of March, 1888, the land hereinabove described, assessed in your name, was sold for tax of 1886 on the 7th day of May, 1888, and that the time of redemption from said sale allowed by law will expire on the 7th day of May, 1891, or 60 days after service of this notice."

The notice was served January 3, 1891. It will be observed that 60 days from that date was March 4. Then the notice stated that the time to redeem would expire on March 4, 1891, or on May 7, 1891. This case cannot be distinguished in principle from *Peterson v. Mast*, 61 Minn. 118, 63 N. W. 168. There the date 60 days from the date of the notice fell after the other specified date of expiration of redemption. The notice here in question recited the time when the sale was made.

Appellant contends that every one is presumed to know the law; that any one knowing the law will understand that the time to redeem will expire three years from the date of sale; and, therefore, there is in law no ambiguity or uncertainty in the notice. In our opinion, the legislature intended to require a notice in fact, not one which can be upheld only by reason of some legal fiction, one which can be understood only by reference to the statute. See *State v. Halden*, 62 Minn. 246, 64 N. W. 568. The other notice of expiration is tainted with the same vice, and is also void.

3. Plaintiff claimed on the trial that in July, 1881, he made a written lease of the premises in question to defendant; that the lease was signed by both parties, and was at the time of the trial in the possession of defendant. Without having served on defendant any notice to produce it, plaintiff offered secondary evidence of its contents. Defendant objected, and denied that any such lease was ever made. The objection was sustained, and this is assigned as error.

Appellant contends that, because defendant denied that the

lease ever existed, no notice to produce it was necessary; that it sufficiently appears that a notice to produce it would be useless, and therefore it may be dispensed with. If defendant had admitted the loss of the written instrument, that would excuse notice to produce it. Wood, Prac. Ev. 28, § 11. But, in our opinion, the case is very different where the defendant denies that the instrument had ever existed. Such a complete and total denial ought not to dispense with anything required of plaintiff. The amount of proof required of the one party cannot be less because the denial of the other party is as absolute and complete as it is possible for it to be. To allow the one party to assert for the first time on the trial that a certain written instrument existed and was in the possession of the opposite party, and, because the latter denied that it ever existed, allow the former to prove the contents of the alleged instrument, without having given any notice to produce it, would open the door for perjury and surprise. In our opinion, the court ruled correctly.

4. There was also some evidence introduced by plaintiff tending to prove that, shortly before the time the alleged written lease was made, there was an oral agreement between the parties by which plaintiff leased the premises to defendant. The evidence shows conclusively that defendant was in possession at the time of this alleged oral leasing, and had been for many years prior thereto. Plaintiff had no title or right to possession. A parol promise by one in possession to pay rent to one out of possession, who had neither title nor right of possession, is void for want of consideration. Fuller v. Sweet, 30 Mich. 237, and cases cited.

This disposes of the case, and the order appealed from is affirmed.

ANNA CADY PHELPS v. JAMES COMPTON and Others.

April 28, 1898.

Nos. 10,972—(63).

Foreclosure of Mortgage—Value of Services—Set-Off—Evidence Sustains Findings.

Held, the evidence sustains the finding that by the agreement of both parties the amounts due each from the other were to be offset or applied in payment of each other.

Same—Counterclaim—Pleading and Proof.

But *held*, in any event, on the pleadings, evidence and findings, the amount due defendant is sufficiently pleaded, proved and allowed as a counterclaim.

Action in the district court for Otter Tail county to foreclose a mortgage. The facts are stated in the opinion. The court, Searle, J., found in favor of defendant, and from an order denying a motion for a new trial plaintiff appealed. Affirmed.

Haupt & Baxter, for appellant.

E. E. Corliss, for respondents.

CANTY, J.¹

On July 2, 1883, the defendant James Compton made and delivered his four promissory notes to D. Cady, three of which were for \$1,000 each, and were due in two, three and four years, respectively, from said date. The other note was for \$2,200, due in five years from said date. To secure the payment of these notes, Compton executed a mortgage to Cady on certain real estate. Cady died in 1895. The executor of his estate assigned the notes and mortgage to plaintiff, and she brought this action to foreclose the mortgage. On the trial before the court without a jury, the court found for defendant. From an order denying a new trial, plaintiff appeals.

Appellant contends that the findings of fact are not supported by the evidence. The court found that during all the time from March, 1883, to April, 1891, Compton was in the employ of Cady, as agent of the latter, and during that time loaned, invested and

¹ BUCK, J., absent, took no part.

collected large sums of money for Cady, and transacted all the business necessary in making such loans, investments and collections; that the amount of money so loaned and invested by Compton for Cady averaged from \$50,000 to \$60,000 per year during all of that time; that said services were performed by Compton at the request of Cady, and were reasonably worth the sum of \$750 per year during that time; that it was understood and agreed between them that Compton was to be allowed what said services were reasonably worth, and that the amount thereof should be applied as payment on said notes; that in 1894 Compton paid Cady \$416, as interest on said notes, and on March 25, 1889, \$2,600, as a payment on the notes.

Appellant concedes that the evidence shows that the services were performed, and that they are of the value stated, but counsel contends that there is no evidence to sustain the finding that it was agreed that the amount due for these services should be applied as payment on the notes.

It is true that there is no direct evidence to that effect. During all of said time, Compton resided at Fergus Falls, in this state, and Cady resided at Amsterdam, New York. Compton had performed similar services for Cady during the time from 1873 to 1883, when the parties had a settlement, and Cady allowed Compton for his services. The services continued in much the same manner. After Compton ceased to perform these services, in 1891, Cady employed another agent to look after his business at Fergus Falls, and this agent continued in such service until Cady's death. It does not appear that Cady ever demanded any payment from Compton, or that Compton ever demanded any payment for his services during all of this time. In our opinion, the circumstances warranted the court in finding that there was an understanding between the parties that the amount due for the services should be applied as payment on the notes.

But there is another reason why the decision should stand. Compton pleaded in his answer all of said facts in relation to his services. True, he did not label this part of his pleading as a counterclaim, or demand any relief thereon. Neither did he allege any agreement that the amount so due him should be applied as

payment. The matter was voluntarily litigated, and the court has found facts which show that defendant is entitled to offset, as a counterclaim, the amount due him for his services, even though he had not proved any agreement that such amount should be applied as a payment on the notes. Then, in any event, the findings of fact support the conclusion of law that plaintiff take nothing by this action.

We are also of the opinion that the court was warranted in finding that the draft for \$2,600 was intended as a payment on the notes in suit, and was so applied. There is nothing in appellant's claim that it does not appear that Cady ever received the draft. His signature is indorsed on the back of the same.

The order appealed from is affirmed.

MICHAEL A. THUL v. GODFREY OCHSENREITER.

April 28, 1898.

Nos. 11,041—(58).

72	111
74	322

Sham Answer—Motion to Strike Out—Counter Affidavits—Order Sustained by Evidence.

On a motion to strike out an answer as sham, *held*, the court below was warranted in regarding the counter affidavits and conduct of defendant as evasive, and the evidence sustains the order striking out the answer.

Appeal by defendant from a judgment of the district court for Scott county, in favor of plaintiff for \$179.35, entered in pursuance of the order of Cadwell, J. Affirmed.

Charles R. Fowler, for appellant.

F. J. Leonard, for respondent.

CANTY, J.

This is an appeal from a judgment entered on an order striking out the amended answer as sham.

The complaint is on a promissory note made by the defendant to plaintiff for the sum of \$120.60. The original answer admitted the making of the note, and alleged as a defense to it that the consideration for it was the purchase price of spirituous and intoxicating

liquor sold by plaintiff to defendant in South Dakota, and that the sale thereof was illegal, and contrary to the constitution and laws of South Dakota. The plaintiff moved the court on three affidavits, one made by himself, one by his attorney, and one by one Moulton, to strike out this answer as sham. The defendant appeared on the hearing, but offered no counter affidavit, and the answer was ordered stricken out, "for the reason that the same does not state a defense to the cause set forth in the complaint," and defendant was given leave to file an amended answer. This he did.

The amended answer set up the same defense, but more fully. It alleges that the intoxicating liquor was so sold at the city of Webster, South Dakota, between January 1, 1891, and January 18, 1893, and sets out the sections of the constitution and statute of South Dakota which prohibit such sales.

Plaintiff on said affidavits, and on two additional ones made by himself, moved to strike out this answer as sham. One of said additional affidavits is included in the other, in which he states that the sole consideration for said note was the sum of \$100, which he delivered to defendant to deposit for plaintiff in the bank at Shakopee, Minnesota, which defendant agreed to do, but did not do; \$15, which plaintiff loaned defendant on or about October 8, 1892; and \$5.60, which plaintiff paid to one Dr. Peabody at defendant's request. The statements in this affidavit are materially different from those contained in plaintiff's affidavits used on the first motion, and are more full and explicit.

Defendant on the second motion read two counter affidavits made by himself, in one of which he avers that the defense set forth by him in his amended answer is true, and that he has read the three affidavits used in support of the motion to strike out the original answer, and that they and each of them are false in so far as they relate to the consideration of said note. He includes in this affidavit all the statements in his other one. He did not in either of his affidavits refer to the two additional affidavits used by plaintiff on this motion. The court below was warranted in regarding this as an intentional evasion, and not a mere oversight. The court was also warranted in regarding defendant's affidavits as somewhat evasive in failing to go more into details as to the circumstances

attending the alleged sales of intoxicating liquor to plaintiff, and in regarding his position on the first motion as evasive, in that he failed to oppose that motion with any counter affidavits at all. Under these circumstances, we are not able to say that the court erred in striking out the amended answer.

Judgment affirmed.

JOHN MEGINS v. SARAH F. PARY and Another.

April 28, 1898.

Nos. 11,163—(52).

Promissory Note—Purchase of Stock at Assignee's Sale—Fraud as Defense.

In an action on a promissory note, the making of which is admitted, the findings of fact state various alleged fraudulent transactions. *Held*, they do not show any defense to the payment of the note.

Insolvency—Filing Release by Creditor—Discharge of Insolvent by Judgment of Court.

Held, further, it is not the filing of a release in an insolvency proceeding under the law of 1881 that discharges the insolvent debtor, but the judgment of the court entered thereon so discharging him.

Same—Accepting Dividend.

Neither does the acceptance of a dividend from the assignee work such a discharge.

Appeal by plaintiff from a judgment of the district court for Otter Tail county, in favor of defendants, entered in pursuance of the findings and order of Searle, J. *Reversed*.

Wm. B. Phelps, for appellant.

Haupt & Baxter, for respondents.

CANTY, J.¹

This is an action on a promissory note dated October 5, 1893, for \$2,350, made by defendants to the order of plaintiff. On the trial before the court without a jury, the court made its findings of fact, and ordered judgment for defendants. From the judgment entered thereon, plaintiff appeals.

¹ BUCK, J., did not sit.

1. From the findings and admissions in the pleadings, it appears that on November 22, 1889, the defendant Olaf Pary was indebted to plaintiff in the sum of \$2,000, and on that day executed his note to plaintiff for that amount; that this note remained unpaid on July 24, 1893, on which day Pary, being insolvent, made an assignment under the insolvency law of this state, for the equal benefit of all his creditors who should file releases of their claims, and his assignee qualified and entered on the discharge of his duties; that, at the time of his assignment, Pary was indebted to Allen, Moon & Co. in the sum of \$3,200; that on October 5, 1893, the assignee was about to sell the stock of merchandise so assigned to him, and, prior to the sale on that day, plaintiff, Pary, and Allen, Moon & Co. entered into an agreement whereby it was agreed that plaintiff should bid off said stock, and transfer it to the defendant Sarah F. Pary, the wife of Olaf; that plaintiff did so bid off the stock for the sum of \$2,524.96, and he and Allen, Moon & Co. advanced and paid each one-half of said sum for the stock; that thereupon, on the same day, plaintiff transferred the stock to Mrs. Pary, and she and her husband signed and delivered to plaintiff the note in suit, and Pary also executed to Allen, Moon & Co. a note for said sum of \$3,200, due to that firm. There is a further finding that the \$2,524.96 so paid to the assignee was furnished by Pary. The proper interpretation of the findings is that all of these matters so occurring on October 5 are one transaction.

The court labels this transaction as secret and fraudulent, but no facts are found which will warrant the conclusion that the transaction was fraudulent. It does not appear that the stock of goods was worth any more than it was sold for, or that plaintiff or Allen, Moon & Co., or its representative, intended to or would have bid more for the stock if the arrangement in question had not been made. Neither does it appear that the money which Pary so furnished was money withheld from his creditors. For all that appears, it may have been money on which his creditors never had any claim. But, conceding that these transactions were fraudulent, that would not destroy the indebtedness owing from Pary to plaintiff for years prior to these transactions, which is the same indebtedness sought to be recovered in this action.

2. The court further finds that on August 21, 1893, plaintiff filed in the insolvency proceedings a claim based on said note for \$2,000, made by Pary November 22, 1889; that the claim was allowed, a release of the same was filed by plaintiff on June 29, 1894, and he received a dividend of 20 per cent. thereon; and that the assignee was "finally discharged by an order of this court dated November 5, 1895." The filing of the release does not discharge the insolvent debtor from the claim of the creditor who filed the release. It requires the judgment of the court to do that. *National G. A. Bank v. Wilder*, 35 Minn. 94, 27 N. W. 201; *In re Walker*, 37 Minn. 243, 33 N. W. 852, and 34 N. W. 591. It is not found that any such judgment was ever entered in the insolvency proceedings. An order discharging the assignee is not such a judgment. Receiving a dividend will not in itself work such a discharge. *In re Walker*, *supra*. It may be conceded that such a judgment would release Pary, the principal debtor, but even that would not release Mrs. Pary, his surety. G. S. 1894, § 4240.

The second finding of fact attempts to find a defense in favor of Mrs. Pary alone. It reads as follows:

"That defendant Sarah F. Pary does not speak nor read nor write the English language, and did not know, nor was she informed as to, the nature or conditions of the notes to which she attached her cross or mark on said 5th day of October, 1893; that she was not negligent in so doing; that, at the time she attached her cross or mark to said note, she was led by plaintiff and others to believe that the notes to be given, and which she was asked to execute, were for the stock of general merchandise that day purchased, and for which she was to pay twenty-five hundred and twenty-four ⁹⁶/₁₀₀ dollars (\$2,524.96), which amount I find she paid in full."

It does not appear from this that Mrs. Pary was so imposed upon that she has a legal defense to the note in suit. She was led to believe that this note was given for the stock of merchandise which was then transferred to her, and it does not appear that there was any deception in this. It appears that she signed the note as a part of the transaction in which she received the stock. She was to pay \$2,524.96 for the stock, and that is more than the amount of this note. The court finds that she has paid this sum, but she could not have paid it to plaintiff, because she denies in her answer that she

ever paid him anything. The court does not find that at the time of the transaction, and as a part of it, she paid that amount in cash to some one else, and signed this note besides, or that she ever agreed at that time to pay that sum to any one, and signed the note besides; and, even if she had done so, there is, so far as appears, as much reason why she should pay plaintiff as there is why she should honor her promise to pay the same amount to some one else. Her husband furnished her, through plaintiff and Allen, Moon & Co., \$2,524.96, or the two latter parties delivered her a stock of goods for which her husband furnished that sum; and, as a part of the same transaction, she signed with her husband the note in suit; and it does not sufficiently appear that this is not a good consideration for the note; neither does it appear that she signed the note given to Allen, Moon & Co.

The judgment is reversed, and a new trial granted.

ANDREW B. LARSON v. W. A. KELLY and Others.

April 29, 1898.

Nos. 10,955—(45).

Action on Bond—Verdict Sustained by Evidence.

The evidence justified the verdict.

Incompetent Testimony—Answering without Objection from Counsel—Motion to Strike Out.

Where the questions propounded to a witness clearly advise the opposite party that they are designed to elicit incompetent testimony, and they are answered without objection, the granting or refusing a motion to strike out the evidence is discretionary with the court.

Justice of the Peace—Failure of Defendant to Appear and Answer—G. S. 1894, § 5022—Entry of Judgment.

The failure of the defendant, in an action in justice's court to appear and answer, is not a confession of judgment, within the meaning of G. S. 1894, § 5022, and in such case the justice has three days within which to render and enter judgments.

Assignments of Error.

Certain assignments of error *held* too general to be available.

Appeal by plaintiff from an order of the district court for Norman county, Ives, J., denying a motion for a new trial. Affirmed.

The tenth, eleventh, twelfth and thirteenth assignments of error referred to in the opinion were as follows:

"10. The court erred in charging the jury substantially as follows: 'That if Justice Kelly, before the third day in which he was authorized by law to render and enter judgment had expired, assisted in a settlement between Andrew B. Larson and defendant Foss and believed that such settlement was made in good faith, then he was not bound to enter judgment.'

"11. The court erred in charging the jury substantially as follows: 'If you find that there was no settlement, and further find that the defendant Foss had property out of which those judgments could be collected, then defendants are liable.'

"12. The court erred in refusing plaintiff's first, second and third requests to charge the jury.

"13. The court erred in denying plaintiff's motion for a new trial."

M. A. Brattland and Carmody & Leslie, for appellant.

W. W. Calkins and N. T. Moen, for respondents.

MITCHELL, J.

This was an action on the official bond of a justice of the peace to recover damages caused by the failure of the justice to enter in his docket judgment in favor of the plaintiff and against one Foss.

The case was here on an appeal from an order overruling a demurrer to the complaint. 64 Minn. 51, 66 N. W. 130. After the case was remanded, the defendants answered. While other matters were set up in the answer, the only defense really urged on the trial, and the only one submitted to the jury, was that within three days after the cause was submitted to the justice the parties thereto made a full settlement of the matters in litigation by which Foss gave plaintiff a promissory note secured by chattel mortgage, which plaintiff accepted in full payment of the claim upon which the action was brought; and that plaintiff advised the justice of the fact, who for that reason did not enter judgment. This the plaintiff put in issue by his reply. This issue was submitted to the jury, which found a verdict for the defendants.

All we need say about the evidence is that we are of the opinion that it justified the verdict.

The only other question necessary to be considered is whether the trial court committed any error (excepted to and assigned as error) in the admission of evidence or in instructing the jury on the issue as to the settlement.

The evidence tended to show that the justice took part in bringing about the alleged settlement, and drew the note and mortgage referred to. Thereupon the defendants introduced evidence of a conversation (which occurred about the time the settlement was alleged to have been made) between the justice and a third party, in which the former stated to the latter that the matter was settled. The plaintiff was not present at this conversation. The questions propounded to the witness clearly disclosed the fact that the evidence sought to be elicited was a conversation between the justice and a third party. The plaintiff made no objection to the questions, but waited until they were answered, and then moved to have the testimony stricken out. Under these circumstances, the court was not bound to strike it out, although inadmissible as hearsay.

The only reasons urged why the instruction referred to in the tenth assignment was erroneous are (1) that there was no evidence to warrant such an instruction, and (2) that it was the duty of the justice to enter judgment forthwith, inasmuch as Foss did not appear or answer in the action before the justice and hence the three-days provision in G. S. 1894, § 5022, did not apply. It is claimed, in this connection, that the evidence showed that the settlement, if any, was not made until two days after the return day of the summons, and that therefore the justice was already in default in not having entered the judgment on his docket.

The first of these reasons is disposed of by saying that there was evidence tending to prove a settlement, and that the justice was aware of the fact. The second reason is disposed of by saying that the nonappearance of a defendant in a justice's court is not a confession of judgment or of the claim of the plaintiff. The plaintiff has to prove his claim notwithstanding the defendant's failure to appear and answer. G. S. 1894, § 4976. The confession of judgment referred to in section 5022 is the confession in writing, and on the personal appearance of the defendant, provided for in the three preceding sections.

While the instruction referred to in the eleventh assignment is not a complete statement of the whole law on the subject, yet, as far as it goes, it was certainly sufficiently favorable to the plaintiff.

Plaintiff's twelfth and thirteenth assignments of error are too general to be available. The assignments of error not covered by what has been already said contain nothing that is entitled to notice, further than to say that they are without any substantial merit.

Order affirmed.

A. E. JORDAHL v. W. T. BERRY and Another.

April 29, 1898.

Nos. 10,965—(78).

72	119
345LRA541n	
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52LRA 897	

Physician—Action for Malpractice—Demurrer—Former Recovery for Services—Res Judicata.

A judgment by default in action by a physician against his patient to recover for professional services is not a bar to an action by the patient against the physician for damages caused by malpractice in the performance of such services.

Appeal by defendants from an order of the district court for Rock county, P. E. Brown, J., sustaining the demurrers of plaintiff to the supplemental answers of defendants. Affirmed.

A. J. Daley, for appellants.

To every issue tendered in the complaint in an action the defendant is bound to interpose every matter of defense which he has, and a failure so to do is a waiver of it forever. *Bazille v. Murray*, 40 Minn. 48; *Thompson v. Myrick*, 24 Minn. 4. When considering the rules governing estoppel by judgment, a judgment by default is attended with the same legal consequences as if there had been a verdict for the plaintiff. *Northern Trust Co. v. Crystal L. C. Assn.*, 67 Minn. 131. The plaintiff is estopped by the judgment against him in an action brought by defendant to recover compensation for services rendered in the same case. *Gates v. Preston*, 41 N. Y. 113; *Blair v. Bartlett*, 75 N. Y. 150; *Dunham v. Bower*, 77 N. Y. 76; 1 Her-

man, Est. § 235. The adjudication by a court of competent jurisdiction that the services rendered were of some value conclusively establishes, between the parties, that the defendants were not guilty of negligent and unskillful conduct in their employment. *New Orleans v. Citizens' Bank*, 167 U. S. 371.

L. S. Nelson, for respondent.

The effect of a judgment cannot be extended or enlarged by argument or implication to matters, which, so far as the records show, were not actually heard and determined. *Ihmsen v. Ormsby*, 32 Pa. St. 198. The better rule, and the only reasonable doctrine, is that plaintiff's claim for damages resulting from malpractice constitutes a separate and independent cause of action which he can enforce without disturbing any matter litigated in the defendant's action for services. *Resseque v. Byers*, 52 Wis. 650; *Whitesell v. Hill*, 101 Iowa, 629; *Lawson v. Conaway*, 37 W. Va. 159; 2 Black, Judgm. § 769; *O'Connor v. Varney*, 10 Gray, 231; *Bascom v. Manning*, 52 N. H. 132; *Barker v. Cleveland*, 19 Mich. 230. If plaintiff in this suit had set up the defense of malpractice in the action before the justice, an adjudication upon that issue would then have been a bar. *Howell v. Goodrich*, 69 Ill. 556.

MITCHELL, J.

This was an action to recover \$5,000 damages for malpractice by the defendants in the performance for plaintiff of professional services as physicians and surgeons. After the action was commenced and at issue, each of the defendants brought an action against the plaintiff, in justice's court, to recover the value of his services, alleged in one case to be some \$22, and in the other \$7. The present plaintiff neither answered nor appeared in those actions, and the present defendants, respectively, recovered judgment for the full amounts claimed. They then set up these judgments, by supplemental answers, as a bar or estoppel to plaintiff's recovery in this action. The plaintiff demurred on the ground that the answers did not state facts constituting a defense. From an order sustaining the demurrers, the defendants appealed.

While the doctrine of estoppel by a former adjudication is as old as the law, few questions have given rise of late years to more dis-

cussion and conflict of opinion than the applicability of the doctrine to a state of facts the same or similar to that presented by this case.

In *Bellinger v. Craigue*, 31 Barb. 534; *Gates v. Preston*, 41 N. Y. 113, and *Blair v. Bartlett*, 75 N. Y. 150, it was held that a judgment in justice's court in favor of a surgeon for professional services was a bar to any action against him for malpractice in the performance of such services. In the first and last of these cases the defendants appeared and answered, but afterwards withdrew their answers. In the other the defendant did not answer, but consented in writing to the entry of the judgment. We do not refer to this as distinguishing in principle those cases from the present, but it may have had some influence upon their decision. See *Bascom v. Manning*, 52 N. H. 132. Neither do we lay any stress on the fact that an action for services is brought in justice's court, except so far as it illustrates the inconvenience and practical injustice of what we may call the New York doctrine. In *Dunham v. Bower*, 77 N. Y. 76, the court applied the same rule to a state of facts not differing in principle.

A directly opposite conclusion was arrived at upon the same state of facts in *Resseque v. Byers*, 52 Wis. 650, 9 N. W. 779; *Lawson v. Conaway*, 37 W. Va. 159, 16 S. E. 564; *Goble v. Dillon*, 86 Ind. 327; and *Sykes v. Bonner*, 1 Cin. R. 464,—in most of which cases the courts reviewed the New York cases, and refused to follow them.

This conflict of opinion among the courts gave rise to an extended and somewhat energetic dispute among text writers.

Mr. Bigelow discusses the subject at some length, and earnestly insists that the New York doctrine is wrong. *Bigelow, Estop.* (5th Ed.) 174 et seq. Mr. Van Fleet takes the same side of the question. *Van Fleet, Former Adj.* § 168 et seq. Mr. Black, while not discussing the matter at any great length, indorses the doctrine opposed to that of New York, as being much better supported by legal reason, and the best considerations of convenience and justice. 2 *Black, Judgm.* § 769. Mr. Browne, in his note to *Resseque v. Byers*, *supra*, in 38 *Am. Rep.* 778, says, of the New York doctrine, that, while unquestionably right in theory, it may well be doubted whether it is convenient or safe in practice; that such estoppels are

odious at best, and are founded on a technicality, and probably promote more injustice than they prevent.

On the other side, Mr. Herman urges with great earnestness that the New York doctrine is sound, and that the courts which have come to an opposite conclusion violate every principle upon which the doctrine of *res adjudicata* is founded. Herman, *Estop.* § 231 et seq. We do not find that Mr. Freeman, in his work on *Judgments*, anywhere discusses this precise question; but in view of the fact that, in support of certain general propositions laid down in his text, he cites the New York cases without any intimation of disapproval, it may perhaps be inferred that he approves of their doctrine. See Freeman, *Judgm.* § 282.

On this state of the authorities, we feel at liberty to adopt whichever rule (permissible on principle) we think the safest, most convenient and equitable in practice; keeping in mind that it is more important to work practical justice than to preserve the logical symmetry of a rule, provided this can be done without destroying all rules, and leaving the law on the subject all at sea.

The foundation principle upon which the doctrine of *res adjudicata* rests is that parties ought not to be permitted to litigate the same issue more than once; that, when a right or fact has been judicially tried and determined by a court of competent jurisdiction, the judgment thereon, so long as it remains unreversed, shall be conclusive upon the parties, and those in privity with them in law or estate. Rightly understood, no doctrine of the law is more in accord with justice and public policy. The difficulty which has always confronted the courts is to determine the extent of the application of that doctrine. Where an issue has been actually litigated and determined on its merits, there can be no doubt, upon either reason or authority, that the judgment is, as between the parties and their privies, conclusive in relation to that point in any other suit, though the purpose and subject-matter of the two suits be different. The difficulty is to determine what points were in issue and determined by the judgment, or, rather, what issues were necessarily involved in the judgment, although not directly and expressly made and litigated.

The American authorities seem to have generally gone somewhat

further in applying the doctrine of *res adjudicata* in that respect than the English courts, whose general tendency is to confine the estoppel of a judgment to matters actually disputed.

Looking at the subject from a practical standpoint, there is certainly great danger of working injustice, unless great caution is used, in holding that a judgment is an estoppel upon a certain point, on the ground that it was necessarily involved in the judgment, although the issue was not expressly tendered and litigated. Frequently one learned in the law can reason out, to his satisfaction, that a particular point was necessarily involved in a judgment, when such a thing would never occur to the ordinary layman. The present case is an illustration of the fact. Whatever conclusion hard logic would require, every one knows that, as a matter of fact, the question of defendants' malpractice was not determined in their suits for services, and that the judgments were in fact for the value of the services, irrespective of, and disconnected from, any claim for malpractice.

The inconvenience of the New York rule, and its liability to work injustice, is further illustrated by the present case. It furnishes an opportunity to create an estoppel by what may not unfairly be called a snap judgment. It is perhaps not uncharitable to surmise that this may have been the very object of defendants in bringing their actions in justice court. But, this aside, if plaintiff had appeared and defended those actions, he would have been put to the alternative of alleging the malpractice as a mere defense, or of setting it up as a cross claim. In either case the judgment would be a bar or estoppel on that issue. If he had adopted the latter course, he could only have recovered \$100, the limit of the justice's jurisdiction, and could never have recovered any more in another suit, because he would not be allowed to split a single cause of action. On the other hand, had he set up the malpractice merely as a defense, and the claims of the defendants for services were less than \$15, the issue, involving a claim of \$5,000, would have been conclusively determined by the judgment of the justice, from which neither party could appeal on facts. We concede that such considerations are not, in themselves, of any force, except as illustrating the inconvenience of such a rule; but where it is open to the

court, upon principle, to choose between two rules, they are entitled to weight.

After starting out with the conceded proposition that a judgment is conclusive of every fact necessary to uphold it, whether the final determination is the result of litigation, or of a default of one of the parties, the reasoning of those who advocate the New York doctrine may be all summed up as follows: If the services were of value, they could not have been useless; and, if of use, they could not have been harmful; and, if not harmful, there could not have been malpractice in the performance of them; therefore a judgment that the services were of value necessarily involved a determination that they were properly performed; and that such an adjudication is necessarily inconsistent with the existence of a claim by the patient for damages for malpractice in their performance. See *Blair v. Bartlett*, *supra*, and *Dunham v. Bower*, *supra*.

We cannot avoid feeling that this line of reasoning is more technical and theoretical than practical. And, even if technically sound, the doctrine of many of the adjudicated cases certainly does not conform to it, as is illustrated in numerous suits between vendor and vendee and employer and employee. The decisions are too numerous to require citation, to the effect that in the case of a sale of personal property, with a warranty of its quality, a judgment in favor of the vendor for the purchase money (the breach of warranty not having been interposed by way of defense or counterclaim) is no bar to an action by the vendor for damages for breach of the warranty. We fail to see why the reasoning adopted in favor of the New York doctrine is not equally applicable to such a case; for, if the property was not as warranted, the contract was broken, and the vendor was never entitled to the full purchase price. It is no sufficient answer to say that the warranty was itself a contract collateral to the contract of sale. There is but one contract, and the warranty is one of its terms, and not a separate and independent contract. *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1.

There are also numerous cases holding that a recovery by an employee on a complaint for services rendered will not estop the defendant employer from recovering damages sustained by him through

the negligent or unskillful performance of such services; such negligent acts not having been set up or litigated in the action for the services. The following are a few of the many cases which might be cited to that effect: *Mondel v. Steel*, 8 M. & W. 858; *Rigge v. Burbidge*, 15 M. & W. 598; *Davis v. Hedges*, L. R. 6 Q. B. 687; *Davenport v. Hubbard*, 46 Vt. 200; *Mimnaugh v. Partlin*, 67 Mich. 391, 34 N. W. 717; *Robinson v. Crowninshield*, 1 N. H. 76. Mr. Freeman himself lays down this doctrine, and cites some of those cases in its support. *Freeman*, Judgm. § 282.

In *Schwinger v. Raymond*, 83 N. Y. 192, the New York court of appeals held the same thing. It is true, the court attempted to distinguish that case from *Dunham v. Bower*, *supra*, on the ground that in the latter the carrier had never performed his contract by transporting and delivering the goods, which were wholly destroyed en route, while in the former the carrier had performed by transporting and delivering the goods, which were only damaged en route. But it is respectfully suggested that the distinction is untenable on principle. In both cases the contract was safely to carry and deliver the property, and in neither was the contract performed. The difference in breach was one of degree merely.

The reasoning adopted in support of the New York doctrine is equally applicable to all these cases; for it could be argued that an adjudication that the employee was entitled to recover for his services necessarily implied that he had performed them properly, and according to the contract, which would be inconsistent with the existence of a claim in favor of the employer for damages for the improper or negligent performance of the services.

The reasoning usually adopted in opposition to the New York doctrine is substantially as follows: That negligence or want of skill in the performance of services, resulting in damages to the employer, creates an affirmative cause of action in his favor, the moment the negligent or unskillful act is committed; that this cause of action, like every other one, carries with it the right of the party to sue on it and put it into judgment in his own way; that one cause of action cannot, in and of itself, when merged in judgment, carry with it another cause of action, however closely the two may be connected; that, where a defendant has a cross claim,

he may set it up as a defense or counterclaim, but is not bound to do so, although the two causes of action grow out of the same contract.

It would be impracticable, as well as unsafe, to define the precise limits of this doctrine, or to lay down any rule of universal application; but, as applied to the present case (which was one in tort, arising on contract), and others strictly analogous; we have concluded that this doctrine is permissible on principle, and much the safer, more convenient, and more equitable in practice.

Order affirmed.

STATE OF MINNESOTA ex rel. SAMUEL A. ANDERSON v. DENNIS M. SULLIVAN.

April 29, 1898.

Nos. 11,084—(234).

Laws 1895, c. 301—Salaries of County Officers—Constitution—Title of Act—Simard v. Sullivan, 71 Minn. 517, Followed.

Simard v. Sullivan, 71 Minn. 517, adhered to and followed; holding that the provisions of Laws 1895, c. 301, relating to county officers whose compensation is authorized to be increased, are invalid, because not expressed in the title of the act.

Same—Invalid Provisions—Effect on Whole Act.

The fact that the provisions as to the salaries of certain officers are invalid does not render the whole act invalid; there being no such dependency or connection between the compensation to be paid to different officers as would justify the courts in holding that the legislature would not have passed the act without the invalid provisions.

Same—Special Legislation—Classification of Counties by Population.

The basis of classification of counties by population is not repugnant to the constitutional prohibition of special legislation.

Same—Uniformity of Operation of Act.

The fact that under the act the compensation attached to a particular office may not be fixed by the county commissioners at the same amount in all counties in the class does not render the act repugnant to the constitutional provisions that all such laws shall be uniform in their operation.

Same—Provisions of Act Based on Existing Special Legislation.

The provisions of the act (unless it be those as to the number and aggregate compensation of clerks, employees, and assistants in the various county offices) are not subject to the objection that they are based on existing special legislation.

Appeal by respondent from an order of the district court for Ramsey county, Olin B. Lewis, J., granting a peremptory writ of mandamus. **Reversed.**

Warner, Richardson & Lawrence, for appellant.

Laws 1895, c. 301, if constitutional, repeals Sp. Laws 1887, c. 363. Laws 1895, c. 301, is not unconstitutional on the ground that it violates the provision that no law shall embrace more than one subject, which shall be expressed in its title, in that it changes the compensation of certain officers from a fee basis to a salary basis. *Potwin v. Johnson*, 108 Ill. 70; *City of Elizabeth*, 49 N. J. L. 488; *State v. Cassidy*, 22 Minn. 312; *Boyle v. Vanderhoof*, 45 Minn. 31; *Timm v. Harrison*, 109 Ill. 593; *Tice v. Bay City*, 78 Mich. 209; *Board v. Heenan*, 2 Minn. 281 (330); *Martin v. Santa Barbara Co.*, 105 Cal. 208; *People v. Wemple*, 115 N. Y. 302. The act was intended to accomplish an aggregate, and not an itemized, reduction. If so, it must be conceded that its title is not only sufficient, but that it is in perfect harmony with the body of the act. It is the absolute duty of the court so to construe the law and its title as to make it appear constitutional if there be any possible way to do it. *McCormick v. Village of W. Duluth*, 47 Minn. 272; *Boyle v. Vanderhoof*, *supra*; *Grimes v. Bryne*, 2 Minn. 72 (89); *Barker v. Kelderhouse*, 8 Minn. 178 (207); *State v. Small*, 29 Minn. 216; *Lavalle v. St. Paul, M. & M. Ry. Co.*, 40 Minn. 249; *Cobb v. Bord*, 40 Minn. 479. The position of the word "officers" in the title, and its use there, indicate that it includes not only the county officers proper but also their deputies, and that the word "reduce" cannot be held to require a reduction of the compensation of each officer.

Laws 1895, c. 301, is not special legislation because it applies only to such counties in the state as have a population of not less than 100,000 and not over 185,000. The object of the constitutional amendment was to exterminate absolutely special legislation, and

to substitute general law in its place wherever it could be effected. *State v. Parsons*, 40 N. J. L. 1. Classification based on population was proper. *State v. New Brunswick*, 42 N. J. L. 51; *Randolph v. Wood*, 49 N. J. L. 85; *Warner v. Hoagland*, 51 N. J. L. 62; *Paul v. Gloucester Co.*, 50 N. J. L. 585; *Cook v. State*, 90 Tenn. 407; *State v. Miller*, 100 Mo. 606; *State v. Graham*, 16 Neb. 74; *Fellows v. Walker*, 39 Fed. 651; *State v. Stuht*, 52 Neb. 209; *State v. Cooley*, 56 Minn. 540; *State v. District Court of St. Louis Co.*, 61 Minn. 542; *Mortland v. Christian*, 52 N. J. L. 521. If some reason for a classification upon the basis of population can be found, it is not for the courts to override the judgment exercised by the legislature. *Nichols v. Walter*, 37 Minn. 264; *State v. Hammer*, 42 N. J. L. 435; *Lloyd v. Smith*, 176 Pa. St. 213; *Gillespie v. City of Pittsburgh*, 138 Pa. St. 401; *State v. Baker*, 55 Oh. St. 1; *State v. Borough of Clayton*, 53 N. J. L. 277; *State v. Sullivan*, 62 Minn. 283.

The act is uniform in its operation. Uniformity is required simply in respect to the particular with which the legislation deals. *Alexander v. City of Duluth*, 57 Minn. 47; *Heck v. State*, 44 Oh. St. 536; *State v. Berka*, 20 Neb. 375; *Corwin v. Ward*, 35 Cal. 195; *Com. v. People's Sav. Bank*, 5 Allen, 428; *Allen v. Drew*, 44 Vt. 174; *State v. Copeland*, 66 Minn. 315; *State v. Sullivan*, *supra*; *Curryer v. Merrill*, 25 Minn. 1; *McAunich v. Mississippi & M. R. Co.*, 20 Iowa, 338; *Groesch v. State*, 42 Ind. 547; *Commissioners v. Miller*, 7 Kan. 479; *Smith v. Judge*, 17 Cal. 547; *Jackson v. Shawl*, 29 Cal. 267; *Caruthers v. Andrews*, 2 Cold. (Tenn.) 378. In order to carry out the provisions of the act it is not necessary to refer to prior special legislation.

J. F. George and Samuel A. Anderson, for respondent.

Laws 1895, c. 301, is in conflict with Const. art. 4, §§ 33, 34. There must be a substantial distinction, where a classification is attempted, having reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such in the nature of things as will, in some reasonable degree at least, account for or justify the restriction of the legislation. *Nichols v. Walter*,

37 Minn. 264; *Lavallee v. St. Paul, M. & M. Ry. Co.*, 40 Minn. 249; *Johnson v. St. Paul & D. R. Co.*, 43 Minn. 222; *State v. Cooley*, 56 Minn. 540; *State v. Copeland*, 66 Minn. 315; *Bowe v. City of St. Paul*, 70 Minn. 341, 73 N. W. 184. The characteristic or peculiarity must plainly distinguish the places included from the places excluded, that is, the law must be so inappropriate to the condition of the places excluded as to be of no advantage or benefit to them. *Atlantic City W. W. Co. v. Consumers W. Co.*, 44 N. J. Eq. 427; *McCarthy v. Com.*, 110 Pa. St. 243. See *State v. Hammer*, 42 N. J. L. 435, 440.

Perhaps the most arbitrary and unreasonable portion of this act is that part of section 11 which says that the act shall become, after ninety days, inapplicable to any county growing out of the class. See also *Com. v. Patton*, 88 Pa. St. 258; *Devine v. Board of Commrs.*, 84 Ill. 590; *State v. Mitchell*, 31 Oh. St. 592; *Mortland v. State*, 52 N. J. L. 521. Distinctions due merely to pre-existing repealable special legislation would not of themselves constitute a proper basis of classification, for that would tend to perpetuate the very peculiarities which the constitution was designed ultimately to remove. *State v. Cooley*, *supra*. Neither can the classification be based on existing circumstances only, or those of limited duration. *State v. Cooley*, *supra*; *Com. v. Patton*, *supra*. The classification is invalid for the further reason that it arbitrarily excludes any county in the class within ninety days after such county shall contain a population exceeding 185,000.

The act more specifically is unconstitutional because it is not uniform in its operation. *Simard v. Sullivan*, 71 Minn. 517, 74 N. W. 280; *Bowe v. City of St. Paul*, *supra*. The act is also unconstitutional for the reason that it is not complete in itself, but refers to various special laws by implication. *Bowe v. City of St. Paul*, *supra*; *State v. Sullivan*, 62 Minn. 283. The act is unconstitutional in toto, for the reason that not only does it contain subjects not expressed in the title, namely, the power and duty to reduce salaries and compensation, but for the reason that the real subject of the act is not in any sense as expressed in the title, but is to fix, regulate and raise, if necessary, not only the salaries and compensations of the various officials, but to fix, regulate and raise the

number of employees. *State v. Cassidy*, 22 Minn. 312; *Cooley*, Const. Lim. 170-172.

MITCHELL, J.

Mandamus to compel the county auditor of Ramsey county to issue to the relator a warrant for his salary as county attorney at the rate of \$5,500 per annum, as fixed by Sp. Laws 1887, c. 363. The county auditor answered to the alternative writ (1) that the act of 1887 was repealed by Laws 1895, c. 301, under which the county commissioners had fixed the salary of county attorney at \$4,000; (2) that the act of 1887 was unconstitutional; and (3) that the relator had by his conduct estopped himself from claiming salary at the rate fixed by the act of 1887. Upon the hearing the relator contended (1) that the act of 1895 was unconstitutional, and hence did not repeal the act of 1887; (2) that the act of 1887 was valid; and (3) that he had done nothing which estopped him from claiming salary under the act of 1887. The district court held with the relator in all of his contentions, and directed a peremptory writ to issue as prayed for. From the order the county auditor appealed.

1. We had the act of 1895 under consideration in *Simard v. Sullivan*, 71 Minn. 517, 74 N. W. 280, where we held it invalid as to all county officers therein named whose salaries are authorized to be increased, because this was not expressed in its title, which is, "An act authorizing and directing the county commissioners * * * to reduce the compensation and number of officers and other employees of such counties," etc. We permitted a reargument of this question in this case, and counsel for the county auditor has urged with much earnestness that the purpose of the act, as indicated or expressed in its title, was merely to accomplish "an aggregate reduction, and not an itemized reduction," of salaries of county officers, and hence that its title was in harmony with the body of the act. But, after fully considering counsel's argument, we see no reason for receding from our former decision.

If the amount of the salary of one county officer was at all dependent upon, or connected with, the amount of the salaries of other county officers, there would be some force in counsel's contention. But we fail to perceive any reason why it is necessary to

increase one officer's salary in order to decrease that of another, or how there is any connection between the two things. Any such construction would enable the act to be used as a mere log-rolling scheme to increase unduly the salaries of some officers at the expense of the others,—a result certainly not suggested by its title. It does not follow, however, that the entire act is invalid.

2. Counsel for the relator contend that the whole act is unconstitutional, as being special legislation, because the attempted classification is not on a valid and proper basis.

By its terms, the act is applicable to all counties having, according to the then last completed state or national census, a population of not less than 100,000 and not over 185,000 inhabitants. The fact that there was and still is only one county (Ramsey) in the class is no objection to the classification, if otherwise proper. Under the provisions of the act, all counties which may hereafter attain a population of 100,000 and not over 185,000 inhabitants will fall within the class, and whenever any of them fall below 100,000 or rise above 185,000 they will drop out of the class. *State v. Cooley*, 56 Minn. 540, 58 N. W. 150; *State v. District Court St. Louis Co.*, 61 Minn. 542, 64 N. W. 190; *Bowe v. City of St. Paul*, 70 Minn. 341, 73 N. W. 184. We have held that cities may be classified according to population. *State v. District Court St. Louis Co.*, *supra*; *Bowe v. City of St. Paul*, *supra*. See, also, *Wheeler v. Philadelphia*, 77 Pa. St. 338. This is equally true as to counties. There can be no doubt that population is a proper basis for classification of cities and counties with reference to the salaries or compensation of city or county officers. If the act under consideration had been made applicable to all counties having a population of not less than 100,000, it would be hardly contended that the basis of classification was not proper.

The only thing that could cast any possible doubt on the propriety of the basis adopted in this act is the fact that it excludes from the class counties having more than 185,000 inhabitants. It is urged that this is an arbitrary classification, not founded upon any apparent natural reason suggested by a difference between the situation and circumstances of the counties included and those excluded from the class, or which suggests the necessity or propriety

of different legislation with respect to them. The subject of classification by population is so largely a matter of policy, and the considerations which enter into it are so numerous and complex, that the legislature must necessarily be allowed a large discretion in the matter; and the courts ought not to hold a statute invalid or special legislation unless it appears very clearly that the basis of classification adopted is purely arbitrary. We cannot say that there may not be some natural reason, founded on a difference in situation and circumstances, why counties having over 185,000 inhabitants should be excluded from the class, as well as those having less than 100,000, or why counties having a population between those limits should not have different legislation in respect to salaries of county officers.

If the basis of classification is proper, an act is general, although it operates only for one class of municipalities, and makes no provision as to those not falling within the class, or for those which, by reason of an increase or decrease of population, pass out of the class. In other words, a law providing for a proper class of municipalities is not lacking in generality because other correlated acts, relating to other classes, have not been enacted. *State v. Borough of Clayton*, 53 N. J. L. 277, 21 Atl. 1026.

3. Another objection urged against the act is that it is not uniform in its operation, inasmuch as the salaries of the officers in all the counties belonging to the class will not, or at least may not, be the same.

This contention is based upon a misapprehension as to what the constitution means by "uniformity of operation." By the act in question the same rule is enforced in each county belonging to the class. Each county has the same rule by which it has to act, and by which it is to be governed. It may be true that in each county in the class the salaries will not be exactly the same, but that will not be because the law is not uniform in its operation, but merely because, in the exercise of the discretion given by it to the county commissioners, different results are produced. The fact that this discretion is given to meet the different conditions in different counties belonging to the same class does not render the act repugnant

to the constitutional requirement of uniformity of operation. See *State v. Copeland*, 66 Minn. 315, 69 N. W. 27.

4. It is further contended that the act of 1895 is invalid because based on prior special legislation. Under the doctrine of *Bowe v. City of St. Paul*, 70 Minn. 341, 73 N. W. 184, this will probably have to be conceded as to the provisions of sections 2 and 3 with reference to the number and aggregate compensation of "clerks, employees, or assistants in, under or about" the various county offices. But this objection does not obtain against the provisions relating to the salary or compensation of the various county officers, whether elected or appointed. Their salary or compensation is in no way based upon prior special legislation. It may be necessary to look into prior special legislation for certain purposes, as, for example, to ascertain how far such legislation is repealed by the general act; but that is a very different thing from attempting to base general legislation upon it.

5. It only remains to consider whether, after eliminating the invalid provisions, the remainder of the act is valid, or whether the whole act is invalid.

Where a portion of a statute conflicts with the constitution, the question whether the other parts are also void must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. The familiar rule on the subject is that, although a part of the statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. *Cooley, Const. Lim.* 210. And in determining whether the invalid portion avoids the whole act the same rule applies as in other cases where a statute is assailed as invalid, viz. that every presumption and intendment is in favor of the constitutionality of the act, and the courts will not be justified in pronouncing it invalid unless satisfied beyond reasonable doubt of its repugnance to the constitution.

Under the decision in *Simard v. Sullivan*, *supra*, the act would,

as we understand the facts, be invalid as to the offices of county physician, clerk of the board of control, county surveyor and superintendent of schools, and probably, under the decision in *Bowe v. City of St. Paul*, supra, as to the aggregate salaries of clerks, employees, and assistants in the various county offices. The apparent intention of the legislature was to provide for the change of fee offices into salaried ones, but the provisions of the act in that regard are exceedingly indefinite and defective. The validity of the provisions of the act as to officers whose compensation previously consisted of fees is not involved in this case, but we shall assume, without deciding, that they are invalid.

The provisions of the act relating to the compensation of judge of probate (except as to the then incumbent of the office), assessor, auditor, attorney and treasurer are, in and of themselves, in no way repugnant to the constitution. The purpose of the act was to regulate and reduce the compensation and number of officers and other employees of all counties belonging to the class. And, while it is apparent that the legislature intended to include all officers and employees within the provisions of the act, yet there is no such connection or dependency between the compensation of the various county officers and employees as would render the provisions as to one incomplete without the provisions as to the others, or as would warrant us in holding that the legislature would not have passed the one without the other. As previously suggested, the amount of the compensation of one officer is neither dependent upon, nor connected with, the compensation of any other officer.

Our conclusion is that the provisions of the act relating to the salary of county attorney are valid. This renders it unnecessary to consider any of the other questions discussed by counsel.

Order reversed.

On Application for Reargument.

May 9, 1898.

PER CURIAM.

We see no good reason for granting a reargument, but the opinion handed down contains one or two statements which ought to be referred to, in order that they may not mislead hereafter.

In considering whether the act of 1895 was invalid in toto or only in part, we named the assessor as one of the officers as to whose salaries the provisions of the act were in and of themselves valid. This was done on the assumption that his salary continued, up to 1895, to be governed by the act of 1887, overlooking Sp. Laws 1891, c. 440, and its repeal by Laws 1893, c. 257, without expressly reviving the former statute. We do not wish to be understood as intimating that this fact affects the validity of the provisions of the act of 1895 as to the salary of assessor, but we merely refer to it in order that it may not be inferred that the question is foreclosed.

In the same connection the opinion states that under the decision in *Bowe v. City of St. Paul*, 70 Minn. 341, 73 N. W. 184, the provisions of the act as to the aggregate salaries of clerks, employees and assistants in the various county offices would probably be invalid because founded on existing special legislation. This statement was made under a mistake as to the facts. As a matter of fact, there was no existing special legislation as to such clerks, employees, and assistants, except assistant county attorney. The fee officers paid their own assistants out of the fees of their offices, and the salaried officers were allowed a specified compensation, out of which they likewise had to pay their own assistants.

Application for reargument denied.

WILLIAM O'BRIEN v. WILLIAM F. GLASOW.

April 29, 1898.

Nos. 11,131—(49).

72 135
77 157

Driving Logs—G. S. 1894, § 2466—Filing Lien Statement—Personal Judgment.

The provisions of G. S. 1894, § 2466, for filing in the surveyor general's office a statement of a claim for driving the logs of another intermingled with those of the plaintiff, have reference only to the continuance and enforcement of a specific lien on the logs. The filing of such a statement is unnecessary for the purpose of maintaining an action for personal judgment against the owner.

Same—Log Mark—Record Owner—Evidence.

The statute gives a right of action against any person in whose name the log mark was recorded; hence evidence that the mark was recorded in the name of the defendant merely as security for the payment of money by another, who was in fact the owner, is incompetent and irrelevant.

Appeal by defendant from an order of the district court for Pine county, Williston, J., denying a motion for a new trial, after a verdict in favor of plaintiff for \$203.57. Affirmed.

L. H. McKusick, for appellant.

Robt. C. Saunders, for respondent.

MITCHELL, J.

This action was brought under G. S. 1894, § 2466, to recover compensation for driving defendant's logs, which were intermingled with those of the plaintiff, and which the latter was obliged to drive in order to drive his own. No lien on the logs is claimed, the action being merely one to obtain personal judgment against the defendant.

The principal question in the case is whether the provisions of the statute for filing a statement of the claim in the office of the surveyor general of the district within 30 days after the completion of the drive is a condition precedent to the maintenance of an action for personal judgment against the owner of the logs, or only a condition to the right of lien on the logs. The language of the statute is that any person compelled to drive the logs of another intermingled with his own

"Shall be entitled to a reasonable compensation therefor from the owner of such logs or timber; and upon the filing in the office of the surveyor general * * * within thirty days after the completion of such driving of any such logs or timber, a statement, * * * such person shall have and retain a lien upon any logs or timber bearing such mark, for the amount of such claim, * * * and may have and maintain a civil action for the amount of such claim, or for the enforcement of such lien, against the owner of such logs or timber, or any person in whose name such mark shall be recorded at the time of filing such claims; provided that a failure to commence such action within thirty days after the filing of such claim shall operate as a discharge of said lien."

The order and connection of the different clauses are such as, according to a literal and strictly grammatical construction, to give force to the contention that the filing of a statement of the claim is a condition of a right of personal action against the owner of the logs, as well as of the right of lien upon the property. But, in view of the usual purpose and office of filing a statement of a claim in analogous cases, we should naturally assume that the provision on that subject in this statute would be made to apply only to the right of lien; and such an interpretation of it is at least fairly permissible. The legislature evidently intended to give two remedies, viz. a personal action against the owner, or a right to enforce a lien on the logs, but bunglingly intermingled the provisions relating to the one with those relating to the other.

It is a familiar canon of construction that common sense and manifest legislative intent should prevail over strict grammatical rules; and, to attain this result, it is sometimes permissible to transpose words or even clauses found in a statute. But a controlling consideration is usage, or the construction which custom or practice has put on this statute. Sedgwick, *St. & Const. Law*, 215. It has been in force over 32 years (*Laws 1866, c. 35*); and we are satisfied that the general, if not universal, construction placed upon it both by those engaged in driving logs and by the bar of the state has been that the provision as to filing a statement of the claim has reference only to the continuance and enforcement of a lien. In none of the cases under this statute which have come to this court where the plaintiff brought merely a personal action against the owner of the logs was there any reference in the pleadings, evidence or briefs to the filing of a statement. See *Anderson v. Mayo*, 32 Minn. 76, 19 N. W. 387; *Osborne v. Nelson Lumber Co.*, 33 Minn. 285, 22 N. W. 540; *Merriman v. Bowen*, 33 Minn. 455, 23 N. W. 843; *Walker v. Bean*, 34 Minn. 427, 26 N. W. 232; *Beard v. Clarke*, 35 Minn. 324, 29 N. W. 142. The only cases where any reference was made to the filing of such a statement were those in which a specific lien upon the logs was sought to be enforced. *Chesley v. De Graff*, 35 Minn. 415, 29 N. W. 167; *Miller v. Chatterton*, 46 Minn. 338, 48 N. W. 1109.

The evidence referred to in the second assignment of error was

properly excluded, for the reason, if for no other, that it was not proper cross-examination. The defendant offered to prove that the log mark of the logs was recorded in his name for the purpose of securing the payment of supplies furnished by him to one Goodwin, who was in fact the owner of the logs. This evidence was properly excluded as incompetent and irrelevant. The statute gives a right of action against the owner or any person in whose name such mark shall be recorded, etc. This view is enforced by the provisions of G. S. 1894, §§ 2405, 2408, 2413, relative to recording log marks, and the transfer of such marks, and the effect thereof. There is nothing in the claim that the plaintiff was estopped by his laches from maintaining this action.

Order affirmed.

FRANK M. JAMES v. CITY OF ST. PAUL.

May 2, 1898.

Nos. 10,924—(4).

Deed—Delivery—Erasure as to One Description—Finding as to Delivery Sustained by Evidence.

The deed in question was delivered to the attorney of the grantee therein named to be examined. The title to a part of the land was found not to be satisfactory, and thereupon it was agreed that the description of this part should be erased from the deed by the grantee, that the rest of the land should be paid for at a certain agreed price, and when such erasure was made and the price paid the deed should be considered as delivered. The price was paid, but the erasure was never made. *Held*, the court was justified in finding that the deed was delivered, and it cannot be considered as delivered as to a part of the land, but not as to the other part.

Same—Reformation—Appeal—Not Entitled to Relief not Asked For.

The plaintiff did not ask for a reformation of the deed at any stage of the proceedings in the court below, and his assignments of error in this court do not raise the question that he is entitled to such reformation. *Held*, he is not in a position to ask for a reversal because such relief was not granted him.

Action to Determine Adverse Claims—Reformation—Reply—Departure.

In order to maintain an action to determine adverse claims under the statute, when the land is vacant and unoccupied, the plaintiff must have a title, either legal or equitable. It is not enough that he has a mere cause of action for the reformation of a deed under which defendant claims title, which cause he has set up in the reply. *Held*, further, such reply is a departure from the complaint, which alleges that plaintiff is the owner of the land.

Appeal by plaintiff from an order of the district court for Ramsey county, Kelly, J., denying a motion for a new trial. Affirmed.

Henry C. James and Uri L. Lamprey, for appellant.

James E. Markham and Hermon W. Phillips, for respondent.

CANTY, J.¹

Plaintiff brought this action to determine adverse claims to certain real estate in St. Paul, and in his complaint alleged that he is the owner of the land, and that the same is vacant and unoccupied. The defendant answered, and admitted that the land was vacant and unoccupied, denied that plaintiff was the owner, and alleged that defendant was the owner, by reason of a deed of conveyance to it from one Lamprey, who at the time of the execution of this deed was the owner of the land.

In his amended reply, plaintiff admitted that at such time Lamprey claimed to own the land, and alleged that a deed was prepared, signed and acknowledged by Lamprey, purporting to convey said land and several other parcels of land to defendant; that Lamprey delivered this deed and an abstract of title to all of the land to defendant's attorney, for the purpose of permitting him to examine the deed and the title to the land, but that it was agreed between the parties that the deed should not be delivered to defendant until the title was found to be satisfactory, and the agreed purchase price was paid; that, as to the lands described in the complaint herein, said attorney found that the title of Lamprey was unsatisfactory, but as to the rest of said lands the title was satisfactory; that thereafter, in August, 1894, it was agreed by and between Lamprey and defendant that the description of the lands

¹ BUCK, J., absent, took no part.

mentioned in the complaint herein should be erased from said deed by defendant, and that it should pay him the price agreed upon for said other lands described in the deed, and that when such erasure was made, and said last-named price paid, the deed should be considered as delivered; that thereafter defendant paid Lamprey this agreed price, but never paid him anything for the lands described in the complaint herein; that through carelessness, forgetfulness and mistake, defendant caused the deed to be recorded without first erasing the description of such last-named lands. On the trial the court found for defendant, and from an order denying a new trial plaintiff appeals.

1. Appellant contends strenuously that the evidence shows conclusively that the deed from Lamprey to the city was never delivered. Conceding that the facts above stated, as alleged in the reply of appellant, are conclusively established by the evidence, we are still of the opinion that it appears therefrom that the deed was delivered by Lamprey to the city. He received his money for the conveyance when the deed was in the possession of the grantee. He knew that the money was paid as the consideration for the deed, and must have known that the grantee intended, on the payment of the same, to regard the deed as delivered, and to place the same on record. Even if he had a right to suppose that the description of the land here in question had been stricken out of the deed, or would be before it was recorded, still the failure to strike out such description did not, under the circumstances, annul the effect of what he intended at the time to be a delivery. Neither can it be held that the deed was delivered as to a part of the land therein described, and not delivered as to the other part.

2. Again, conceding that the reply alleged and the evidence established facts which show conclusively that plaintiff is entitled to have this deed reformed in equity by striking out such description, still he never asked for any such relief in his pleadings or on the trial in the court below, and his assignments of error raise no such question in this court. All of the assignments of error which are at all material read as follows:

“The district court erred: (1) In finding that the deed from Lamprey to the city was ever delivered; (2) in finding that the lots

in controversy were conveyed by Lamprey to the city;" "(4) in holding that the testimony showing that the deed never was delivered could not be considered, as it would contradict the deed; (5) in disregarding the testimony in the case bearing upon the non-delivery of the deed and the nonconveyance of the property to the city;" "(7) in finding that the city is the owner of any of the property in controversy; (8) in not finding the appellant to be the owner thereof."

Appellant insists in his brief that the deed was never delivered, as to any of the property described in it. It is true that appellant also suggests that the evidence shows conclusively that the deed should be reformed, but this suggestion seems to be an after-thought, and it is a fair conclusion from the record that no such suggestion was ever made to the court below. We cannot reverse the order appealed from merely because the evidence conclusively shows that appellant is entitled to relief which he never asked for at any stage of the proceedings in the court below, and when his assignments of error in this court fail to raise any such question.

3. There is also another reason why appellant cannot have the deed reformed in this action. G. S. 1894, § 5817, provides that a plaintiff may bring an action to determine adverse claims in two instances: First, when he is in possession; and, second, when the land is vacant and unoccupied, and he has or claims title. In *School District v. Wrabeck*, 31 Minn. 77, 16 N. W. 493, it was held that a plaintiff in possession might maintain such an action, and, in his reply to defendant's answer, might ask for the reformation of the deed under which defendant claimed title. The same is held in *Scofield v. Quinn*, 54 Minn. 9, 55 N. W. 745. Possession alone, without title, gives the plaintiff a standing to challenge the adverse claims of the defendant in such an action. But, if the land is vacant and unoccupied, the plaintiff has no standing to maintain such an action, unless he has title or claims title. Neither does the statute mean that a plaintiff who claims title, when in fact he has no title, either legal or equitable, can maintain an action against some one else, whose claim of title is at least as well founded as is that of plaintiff.

Plaintiff had no title to this land, either legal or equitable. He had a mere cause of action for the reformation of the deed, but he

has no standing to assert any claim to this land until the deed is reformed. In this case the defendant set up an unfounded claim to the land, arising out of void condemnation proceedings. Suppose it had set up no other claim in its answer, and in his reply plaintiff had asked to have this deed reformed. What connection would there be between defendant's claim under the condemnation proceedings, and plaintiff's claim to have the deed reformed? Clearly none, and the reply would be demurrable, or should be stricken out, because irrelevant and a departure from the complaint. Let us suppose that after the reply was stricken out the parties went to trial. The plaintiff could not prove any title or claim of title, because he could not contradict Lamprey's deed, and under the pleadings he could not have that deed reformed. But the fact that the reply in this case was relevant, and responsive to the facts set up in the answer, did not relieve that reply from the charge that it was a departure from the complaint. In his reply, plaintiff changed front, and admitted that he did not have title as in his complaint alleged; that he could only claim title by having the deed reformed; that therefore on the trial he would not be able to prove the allegations of his complaint; and would only be able to prove the allegations of his reply. Many cases may arise where the plaintiff may, in such an action as this, set up in his reply facts which entitle him to have the instrument under which defendant claims in his answer reformed in equity. But the plaintiff cannot do this when he is not in possession, and the reply shows that the allegations of the complaint are false, and that he has no title.

Order affirmed.

EMERY H. BREAULT and Others v. MERRILL & RING LUMBER COMPANY and Another.

May 2, 1898.

Nos. 10,954—(57).

Foreclosure of Log Lien—Wrongful Taking from Sheriff—Action for Depriving Claimant of His Lien.

Where, pending an action to foreclose a log lien, the logs were wrongfully taken from the sheriff, who had seized and held them under the writ of attachment issued in the action, *held*, although the log-lien claimant was not entitled to the possession of the logs, he may maintain against the persons who took and sawed them up an action for damages for depriving him of his statutory lien.

Same—Void Attachment—Judgment—Collateral Attack.

Conceding, without deciding, that the attachment proceedings appear on their face to be irregular and void, and that, if the log-lien foreclosure action was merely an action in rem, the judgment therein would be void on its face, *held*, it is not merely an action in rem; the defendants herein were defendants in that action; the court had personal jurisdiction of them, entered a judgment foreclosing the lien on all the logs described in the complaint, and these defendants cannot impeach that judgment collaterally.

Admission of Evidence—Error without Prejudice.

The admission of certain evidence, if error, *held* error without prejudice, because the same facts were conclusively proved by other competent evidence.

Findings Sustained.

Evidence *held* to sustain the findings of the court.

Misjoinder of Plaintiffs—Waiver.

The defendants failed to object in any manner in the court below to a misjoinder of parties plaintiff. *Held*, the objection is waived.

Rulings of Court.

Certain other rulings of the court disposed of.

Appeal by defendants from a judgment of the municipal court of Duluth, in favor of plaintiffs for \$288.97, entered in pursuance of the findings and order of Edson, J. Affirmed.

Most of the facts are stated in the opinion. The sheriff attached

the logs, as mentioned in the opinion, on May 6, 1895, and notice of the levy was duly served on each of the defendants. The judgment in the action to foreclose Breault's lien was entered April 21, 1897.

Draper, Davis & Hollister and H. J. Grannis, for appellants.

Teare & Middlecoff, for respondents.

CANTY, J.¹

The complaint herein alleges, in substance, that the plaintiff Breault, one Jackson and one Olson each performed labor in cutting certain pine saw logs; that each duly filed a lien statement therefor in the office of the proper surveyor general; that Jackson and Olson each duly assigned his claim to Breault; that an action was duly commenced by Breault in the district court, and judgment was duly entered in his favor thereon, declaring the sums due on the three claims to be a lien on the logs; that the defendants herein obtained possession of the logs, and converted them to their own use, to the damage of plaintiff in the sum of \$264, the amount so adjudged in the former action to be due on the three claims; and that Breault assigned a part of this claim to the other plaintiffs. Plaintiffs demand judgment for said sum of \$264. The defendants answered, and on the trial before the court without a jury a decision was rendered in favor of plaintiffs. From the judgment entered thereon, defendants appeal.

1. Appellants contend that this is an action for conversion; that such an action will not lie unless the plaintiffs are entitled to the possession of the property converted; that none of the plaintiffs in this case are entitled to such possession; that no one but the sheriff who attached the property in the log-lien foreclosure suit is entitled to possession, or to maintain an action of trover for the logs taken from his possession, and therefore this action cannot be maintained.

It was undoubtedly true that the common-law action of conversion would not lie unless the plaintiff was entitled to possession. It is also true that none of these plaintiffs ever were entitled to the possession of those logs, that no one but the sheriff who attached them is entitled to such possession until he has disposed of

¹ BUCK, J., absent, took no part.

them on the execution sale, and that he may maintain trover for the taking of the logs from his possession. But that does not dispose of this case. The plaintiff Breault had a statutory lien on the logs. The seizure of them by the sheriff was not the inception of that lien, but merely one of the steps which continued it in force. Under these circumstances, Breault had a right to maintain an action on the case for damages for wrongfully depriving him of that lien, even though he was not entitled to the possession. It was so held in *Goodrow v. Buckley*, 70 Mich. 513, 38 N. W. 454, a case similar to this. Neither is it necessary, under our practice, to label the case as an action in trover or an action on the case. If the complaint states facts which show that plaintiff is entitled to recover, it is sufficient.

2. In his return to the writ of attachment, the sheriff did not state the quantity of the logs levied on. He simply returned that he had levied on all the logs of the mark in question at the yards and mill of the Merrill & Ring Lumber Company, in West Duluth, in the city of Duluth, in St. Louis county, Minnesota. G. S. 1894, § 2454, provides that the sheriff shall file a certified copy of the writ with the return of levy indorsed thereon, specifying the mark or marks upon the logs and the quantity levied upon by him, in the office of the surveyor general. Appellants contend that, because of the defective character of the return, the levy appears to be void, and that therefore it appears on the face of the judgment that the court had no jurisdiction of the action; citing *Griffin v. Chadbourne*, 32 Minn. 126, 19 N. W. 647, and *Scott & H. L. Co. v. Sharvy*, 62 Minn. 528, 64 N. W. 1132.

Whether or not the point would be well taken if it were not for the facts hereinafter stated, we need not consider. These defendants were made parties to that action, answered therein, and admitted that defendant Prindle had then become the owner of the logs, by a sale of them to him by the Merrill & Ring Lumber Company. It appeared that one Archambault was the owner of certain described lands, on which the pine in question was standing; that he sold the logs, thereafter to be cut, to the Merrill & Ring Lumber Company, and contracted with Lane & Raymo to cut, haul and bank the logs; that they employed Breault, Jackson and Olson,

and that 2,500 pine saw logs, containing about 170,000 feet, were so cut from this land, and were then in the boom of said Merrill & Ring Lumber Company, in Duluth; and that all of said logs bear the mark C. L. R. In its findings of fact in that action, the court found that Breault, Jackson and Olson performed work and labor "upon the logs and timber described in the complaint." In its conclusions of law, the court ordered judgment in favor of the plaintiff therein, and against Lane & Raymo, for \$193.60, and interest, costs and disbursements; adjudging "that the said sum, with interest, as aforesaid, is a lien upon the said logs and timber described in the foregoing findings," and that the logs be sold, etc. The judgment adjudges "that the plaintiff take and have judgment herein against Lane & Raymo, and each of them, and that the same, with all interest and costs, shall be a lien upon the logs and timber described in the findings of fact filed herein, and each of the same, and all logs marked C. L. R., as described in the finding of facts herein." It then proceeds to adjudge the amount due, and orders the logs sold to pay the same. The judgment is not void for uncertainty, because it refers to other records in the judgment roll for a description of the logs.

We are of the opinion that this action had become something more than a proceeding in rem to condemn and sell the logs which the sheriff had seized. The judgment declared the amount adjudged due a lien, not on the logs attached by the sheriff, but on all the logs described in the complaint. This judgment is binding on these defendants. As against them, the action had become one in personam, to foreclose a lien on all the logs described in the complaint, including those seized by the sheriff. Whether or not this method of proceeding was regular is now wholly immaterial. The court had jurisdiction of the persons of these defendants, and they cannot impeach that judgment collaterally. There is nothing in appellants' claim that the judgment is so indefinite that it is void.

3. One of the attorneys of plaintiffs testified that, just after the judgment in the lien foreclosure suit was entered, he called up the Merrill & Ring Lumber Company through the telephone. Little, the secretary of the company, responded. The witness in-

formed him that the judgment had been entered, and asked him what had become of the logs. He answered that they were sawed up in the spring of 1895. He also stated that the logs so cut by Lane & Raymo had been delivered. Whether, as appellants contend, this evidence is incompetent, because it did not appear that Little had authority to represent the company in making the admissions, we need not consider. Little testified on the trial to the facts so admitted, and his evidence was in no manner contradicted or impeached. Then the facts were conclusively proven by other evidence, and, if it was error to admit the evidence as to these admissions, it was error without prejudice.

4. The defendants are estopped by said judgment from denying that Breault had a lien on the logs described in the complaint, including those seized by the sheriff; and we are of the opinion that the evidence will support a finding that the defendants, acting together, converted a quantity of these logs, of the value of at least \$264, the amount of the judgment. It is immaterial whether the value of the quantity so converted exceeded this, or amounted to \$600, as found by the court. We are also of the opinion that the evidence sufficiently identifies the logs so converted as the logs on which it was adjudged Breault was entitled to a lien.

5. Whether or not there was any evidence to prove that Teare & Middlecoff were properly joined as plaintiffs in this action with Breault, we need not consider. The defendants did not plead any misjoinder of plaintiffs, and did not at any stage of the proceedings of the court below object to the joinder of Teare & Middlecoff as plaintiffs. Then the objection was waived.

6. If the execution issued on said judgment was not properly in evidence, it was error without prejudice. The same may be said as to the admission in evidence of the log-lien statements, and of the bill of sale from Archambault to Prindle. The answers of Prindle and the Merrill & Ring Lumber Company in a former action between the parties, containing certain material admissions, were properly received in evidence; and, even if some of these admissions were not sufficiently definite in themselves, some of the other evidence in the case assisted in making them so. The finding of the court that plaintiffs were the owners of the logs, and

entitled to the possession of the same, though erroneous, is immaterial. Breault is, as we have seen, entitled to recover, even though he is not the owner, or entitled to the possession.

This disposes of all the questions raised having any merit, and the judgment appealed from is affirmed.

JOHN BERGLUND v. E. GRACE GRAVES and Others.

May 2, 1898.

Nos. 11,010—(182).

Tax Sale—Purchase by State—Judgment for Taxes in Subsequent Years—Lien—State Assignment Certificate.

After the state has, at a tax sale, bid in the land for the taxes of one year, it is not obliged to obtain a tax judgment, and sell the land for the delinquent taxes of each subsequent year. Whether it may do so, quære. In any event, its lien for such subsequent taxes does not lapse by reason of the failure to do so. And, several years after such subsequent taxes became delinquent, the state may, by a state assignment, transfer to a private person its lien for the same, together with its claim under the tax sale at which it bid in the land.

Same—G. S. 1894, §§ 1600, 1601—Assignee—Interest on Subsequent Taxes—Redemption.

Construing together sections 1600 and 1601, G. S. 1894, *held*, a person obtaining a state assignment of lands bid in by the state at a tax sale must pay interest on subsequent delinquent taxes from the time they became delinquent; and the owner who redeems thereafter must pay interest from the date of the assignment on this interest, as well as on all other sums which the assignee was legally required to pay.

Same—Notice of Expiration of Redemption—"Graves & Van Brunt"—Void Service of Notice.

The notice of expiration of redemption was issued to "Graves & Van Brunt," these being the names of the persons to whom the land was assessed appearing in the assessment book. The owners of the land were E. Grace Graves and Mary A. Van Brunt. The notice was served on Charles H. Graves and Walter Van Brunt, who had been partners, under the name of "C. H. Graves & Co." *Held*, the service is void.

Appeal by plaintiff from a judgment of the district court for St.

Louis county, in favor of defendant E. Grace Graves, entered in pursuance of the findings and order of Ensign, J. Modified.

Wm. B. Phelps and John Jenswold, Jr., for appellant.

M. Douglas and Teare & Middlecoff, for respondent.

CANTY, J.

Plaintiff, claiming to be the owner of the land in question, brought this action to determine adverse claims to the same. His claim of ownership is based on certain tax proceedings. Defendants claim under the patent title. On the trial the court found for defendant E. Grace Graves. From a judgment entered in favor of said defendant, plaintiff appeals.

1. The taxes for the year 1892 remaining unpaid and being delinquent, a tax judgment was entered for the same on March 21, 1894, for the sum of \$271.51. The land was sold on this judgment at the tax sale held on the first Monday in May, 1894, bid in by the state, and no redemption was ever made from the sale. The taxes for the year 1893 were never paid, and no steps were ever taken to obtain a tax judgment for the same, or to sell the land on any such judgment. On January 30, 1897, plaintiff paid into the county treasury the sum of \$724.05, being the amount for which said land was bid in at said tax sale and interest thereon, together with the amount of all subsequent delinquent taxes and penalties thereon and certain items of interest on said delinquent taxes. Thereupon the auditor made to plaintiff a state assignment certificate of the land, in the form prescribed by statute.¹ The court below held that, in order to include the taxes of 1893 in this assignment, the county officials should have obtained a tax judgment for these taxes, and sold the land at tax sale under that judgment, and that, because the taxes of 1893 were included in the state assignment to plaintiff, that assignment was absolutely void, and judgment was ordered adjudging that he had no lien on the land.

Respondent contends that, when land is bid in by the state for the taxes of one year, the statute requires that judgment shall be entered for the taxes of every subsequent year, and the land sold for such taxes in the same manner as if it had never been bid in

¹ G. S. 1894, § 1601.

by the state. Counsel cite G. S. 1894, § 1579, which provides that the list filed in the clerk's office as a complaint on which to obtain judgment "shall contain a description of each piece or parcel of land on which such taxes shall be so delinquent." No exception is expressly made of lands which had been bid in by the state.

On the other hand, appellant suggests that a subsequent sale for subsequent taxes is paramount to a prior sale for prior taxes; that, if the proper interpretation of the statute is as respondent contends, a private individual purchasing at such a subsequent tax sale would, when the time to redeem from that sale expired, if there were no redemption, take a title which would cut out the claims of the state on the prior sale at which it bid in the land. Whether or not, after the state has bid in the land for the taxes of one year, it may obtain judgment, and sell the same land for the taxes of each subsequent year, we shall not now decide. We are of the opinion that, in any event, it is not obliged to do so, under the statute. G. S. 1894, § 1600, provides:

"The taxes for subsequent years shall be levied on property so sold or bid in for the state, in the same manner as though the sale had not been made; and if the purchaser or assignee of the state shall pay such taxes, the amount thereof, with interest from the date of payment after they shall have become delinquent, at the same rate as is provided upon the amount bid on the sale, shall be added to and be a part of the money necessary to be paid for redemption from sale."

Even if a judgment should have been entered for the taxes of 1893, and the land sold thereon at a tax sale, the lien of the state did not lapse by reason of the failure to do so; and we are of the opinion that, under this section, the claim of the state for these taxes should be included in the state assignment with the claim of the state under the tax sale at which it bid in the land, and that, if the assignment was otherwise valid, it transferred to plaintiff the lien of the state for the taxes of 1893.

2. The court found that included in said \$724.05, which plaintiff so paid into the county treasury, was interest on said taxes of 1893, since the same became delinquent. It is contended by respondent that the county treasurer was not entitled to receive

from plaintiff, on said assignment, any interest on these taxes; that the owner was entitled to redeem at any time after the assignment to plaintiff, without paying any interest on these taxes except interest from the date of the assignment; and that, therefore, the amount so paid the county treasurer and the amounts stated in the notice of expiration of redemption were too large, and said assignment and notice were both void. The trial court so held.

In order to determine whether interest should be charged on such subsequent taxes from the time they became delinquent, or only from the time they are transferred by the state assignment, we must construe said section 1600 with section 1601, which, so far as here material, reads as follows:

"At any time after any piece or parcel of land shall have been bid in for the state, and before such piece or parcel of land shall have become forfeited to the state, and while such tract or parcel of land shall remain unredeemed, the county auditor shall assign and convey the same, and all the right of the state in any such piece or parcel of land acquired at such sale, to any person * * * who shall pay the amount for which the same shall have been bid in, with interest, and the amount of all subsequent delinquent taxes, penalties, costs and interest upon the same."

It will be observed that section 1600 provides that, "if the purchaser or assignee of the state shall pay such [subsequent] taxes, the amount thereof, with interest from the date of payment after they shall have become delinquent * * * shall be added to and be a part of the money necessary to be paid for redemption," while section 1601 requires the person receiving the state assignment to pay "all subsequent delinquent taxes * * * and interest upon the same," which clearly means interest from the time the taxes became delinquent.

There is therefore an apparent repugnancy between these two sections, and it is the duty of the court to reconcile them if that can be done by any reasonable construction. In the natural order of things, section 1601 should be read before section 1600. By referring first to section 1601, we ascertain the amount which the assignee of the state must pay in order to receive the assignment, which amount includes interest on such subsequent taxes from the time they became delinquent; and, by then referring to section

1600, we can understand that the legislature intended to provide that the person redeeming should pay this amount, with interest thereon from the date of payment by such assignee; that, in computing the amount which the redemptioner should pay, a rest should be taken at the date of the assignment, and interest charged thereafter on all interest accruing prior to that date. While section 1600 is somewhat awkwardly worded, this, in our opinion, is what it means. It follows that the trial court erred in holding void the assignment to plaintiff.

3. On June 17, 1897, said notice of the time of expiration of redemption was issued to "Graves & Van Brunt," these being the names of the persons to whom the land was then assessed, as they appeared in the assessment books. From 1887 to 1895 the land was owned by E. Grace Graves and Mary A. Van Brunt, and in 1895 the latter conveyed her interest to the former. Said notice of expiration was never served on either of these, but was served by the sheriff on Charles H. Graves and Walter Van Brunt, who, for several years prior to 1894, were partners in the real-estate business, and residents of Duluth, where the land here in question is situated, and where they carried on said business under the name and style of "C. H. Graves & Co." It does not appear that any such firm as "Graves & Van Brunt" existed or was known. From all of these circumstances, it must be inferred that the term "Graves & Van Brunt," as used in the assessment book, was intended to designate the true owners of the land, E. Grace Graves and Mary A. Van Brunt, though omitting their Christian names. Whether the persons to whom the land was assessed were properly designated in the assessment books, it is not necessary to consider. In any event, the service on Charles H. Graves and Walter Van Brunt was void and of no effect, and there never was any service of the notice. We are therefore of the opinion that the state assignment to plaintiff is valid, but that the notice of expiration of redemption has never been served, and the time to redeem has not yet expired.

The case should be remanded, with directions to the court below to modify the judgment in accordance with this opinion. So ordered.

WARREN POTTER and Another v. E. G. HOLMES and Another.

May 2, 1898.

Nos. 11,074—(92).

72	153
74	509
74	513
72	158
178	161

Order Overruling Demurrer to Amended Complaint—Appeal—Review.

Whether the court erred in allowing an amended complaint, and whether it erred in denying a motion to set aside the order allowing the same, cannot be considered on an appeal from an order overruling a demurrer afterwards interposed to such complaint.

Change of Venue—Demand—Laws 1895, c. 28—"Time for Answering"—Amendment of Complaint.

Neither of the defendants resided in the county in which this action was brought. When the same was commenced, they duly demanded that the place of trial be changed to the county in which one of them resided, and made a motion for that purpose on the proper affidavit. Before the hearing, the motion was abandoned. They subsequently answered the complaint, went to trial, and a verdict was rendered against them. On their subsequent appeal it was held that the complaint did not state a cause of action. Thereafter the complaint was amended in the court below, and they were given 20 days in which to answer. Within the 20 days and 3 years after the action was commenced, they demanded a change of the place of trial under Laws 1895, c. 28, which had been passed in the meantime. *Held*, "the time for answering," within which a demand for a change of the place of trial must be made, had long since expired, notwithstanding the fact that the original complaint did not state a cause of action; and the amendment of the complaint did not revive or extend the time to make the demand.

Refusal of Arbiter to Act.

Rule applied that a party is not precluded from recovery merely because the arbiter agreed on by the parties in their contract refuses to act when duly requested.

Contract—Want of Mutuality—Performance.

Conceding, without deciding, that the contract in question is void for want of mutuality, it is valid and binding as far as it is performed.

Overruling Demurrer—Leave to Answer—Review.

The court below overruled the demurrer to the complaint without giving defendants leave to answer. *Held*, the question of whether the court abused its discretion in failing to give such leave cannot be raised in this court until the defendants have applied for leave to answer.

Appeal by defendants from an order of the district court for Aitkin county, Holland, J., overruling a demurrer to the amended complaint. Affirmed.

Warner, Richardson & Lawrence, for appellants.

M'Clenahan & Mantor and *Choate & Merrill*, for respondents.

CANTY, J.

This action was commenced in September, 1894, in Aitkin county. Before the time to answer expired, defendants served on plaintiffs a demand for a change of the place of trial to Becker county, and moved for such change on the affidavit of defendant Holmes, that he then, and for more than a year prior thereto, resided in that county, and that neither defendant ever resided in Aitkin county. Plaintiffs then made a counter motion that the place of trial be retained in Aitkin county, on the ground of the convenience of witnesses. See *Jones v. Swank*, 54 Minn. 259, 55 N. W. 1126. Thereupon both motions were mutually abandoned by the parties. Defendants demurred to the complaint. The demurrer was overruled. They answered, and went to trial. A verdict was rendered for plaintiffs; a motion for a new trial was heard and denied; and, from the order denying the same, defendants appealed to this court. The order was reversed, and a new trial was granted, on the ground that the complaint did not state a cause of action. See 65 Minn. 377, 68 N. W. 63.

After the mandate was filed in the court below, plaintiffs moved for leave to amend their complaint. Defendants appeared in opposition to this motion, and set up, by affidavits, certain facts, to show that they were induced by the fraud of plaintiffs to abandon their motion for a change of the place of trial; that they had incurred large expenses on the former trial, and that leave to amend the complaint should be granted only on condition that these expenses be repaid them; that, by reason of local prejudice, defendants could not have a fair trial in Aitkin county, and the place of trial should be changed to Becker county. The court granted plaintiffs leave to amend, without imposing on them these or any other conditions, and gave defendants 20 days to answer the amended complaint. At the hearing of this motion, plaintiffs' at-

torneys were given leave to serve on defendants' attorneys such additional affidavits as they might desire. No such affidavits were ever served. The court held the motion under advisement for about 11 months, and then granted it, as aforesaid. Defendants then moved to set aside the order granting the motion, on the ground that it was not finally submitted before the court decided it. This motion was denied.

Defendants then made a new demand for a change of place of trial, and served new affidavits stating the place of their residence at and just prior to the commencement of the action. The demand and affidavits were then filed with the clerk, and, claiming to act under Laws 1895, c. 28, they induced him to transmit the files and records in the case to the clerk of the court in Becker county. Thereafter, and within the 20 days, defendants demurred to the amended complaint, on the ground that it did not state facts sufficient to constitute a cause of action. Plaintiffs noticed the demurrer for hearing before the court in Aitkin county. At the hearing defendants appeared specially and objected to the hearing on the demurrer, on the ground that the court had no jurisdiction, for the reason that the case had been transferred to Becker county. The objection was overruled. Thereupon the court overruled the demurrer, and in the order overruling the same it is recited that plaintiffs appeared at the hearing, and defendants did not appear. From the order overruling the demurrer, defendants appeal to this court.

1. We have recited a large number of facts which we deem wholly immaterial in the consideration of this appeal, and we might have recited many more irrelevant facts which the appellants have put into the record. Most of the questions attempted to be raised by appellants on these facts cannot be here considered. Whether the court abused its discretion in allowing the complaint to be amended unconditionally or at all, and whether the court erred in denying defendants' motion to set aside the order granting leave to amend the complaint, cannot be considered on an appeal from an order overruling a demurrer to that complaint.

2. The only questions which can be considered on this appeal are: (1) Had the action been removed from Aitkin county at the

time of the hearing on the demurrer? And (2) does the amended complaint state a cause of action?

(1) Section 5188, G. S. 1894, as amended by Laws 1895, c. 28, provides:

"If the county designated for that purpose in the complaint is not the proper county, the action may notwithstanding be tried therein, unless the defendant before the time for answering expires demands in writing that the trial be had in the proper county, which demand shall be accompanied by an affidavit of the defendant" as to his place of residence, etc.

In *Flowers v. Bartlett*, 66 Minn. 213, 68 N. W. 976, we held that, when this section was complied with, the case was ipso facto removed to the county of the defendants' residence on filing the demand and affidavits. But such demand must be made "before the time for answering expires." On the authority of *Veeder v. Baker*, 83 N. Y. 156, appellants contend that their time to answer did not expire until after a good complaint had been served,—one which they were obliged to answer; that the original complaint stated no cause of action, and, although defendants answered it, there was nothing to answer, and therefore their time to answer did not expire until at least 20 days after the complaint was amended, and not then if the demurrer to the amended complaint should be sustained. Again, on the authority of *Penniman v. Fuller & W. Co.*, 133 N. Y. 442, 31 N. E. 318, appellants contend that, when the complaint was amended, it revived their right to demand a change of the place of trial. That case merely holds that the time to answer (within which defendant must demand a change of the place of trial) does not expire so long as he has a right to amend the answer as of course, and without leave of court.

We are clearly of the opinion that defendants' right to demand a change of the place of trial should not be extended for years on any such an interpretation of the statute. It is apparent from the record that for three years defendants had abandoned their demand for a change of the place of trial. The reasons that induced them to abandon it cannot be considered on this appeal, if they can on any other. The amendment of 1895 was not intended to revive any right that had already been lost, or to preserve any

such right for years after it had been so revived. This court has several times held that neglect to enforce within a reasonable time the right of a party to a change of the place of trial is fatal to that right. *Waldron v. City of St. Paul*, 33 Minn. 87, 22 N. W. 4; *McNamara v. Eustis*, 46 Minn. 311, 48 N. W. 1123.

"It may be stated as a general rule that the application [for a change of the place of trial] should be made at the earliest opportunity, or at least within a reasonable time after acquiring knowledge of the existence of the ground upon which the application is based; it being incumbent on the applicant to explain any seeming lack of diligence on his part." 4 Enc. Pl. & Prac. 421, and the many cases cited.

That this is the policy of our legislation is shown by the fact that the demand for the change must be made promptly; that is, before the time for answering expires, which ordinarily is only 20 days after the commencement of the action. The statute should not be so interpreted that the time to make the demand or enforce the right will be revived or extended by various unforeseen and unexpected contingencies. It is the intent of the statute that the plaintiff shall know promptly and with certainty where the place of trial is to be. Our conclusion is that the action and the place of trial of the same remained in Aitkin county, notwithstanding the proceedings taken to remove the same to Becker county.

3. (2) Does the amended complaint state a cause of action? It is similar to the complaint considered on the former appeal, except that the following has been added by amendment:

"That after the delivery of said ties as aforesaid, and on or about the 15th day of April, 1894, these plaintiffs notified the defendants herein, and also notified the Northern Pacific Railroad Company, named in Exhibit A as inspector of said ties, that said ties had been delivered as aforesaid, and requested said railroad company to inspect and accept the same in compliance with the terms of said agreement; that said railroad company then and there refused to inspect and accept said ties, and ever since said time has so refused and neglected to inspect or accept the same."

It was held by the majority on the former appeal that by their contract the parties had chosen the railway company as an arbiter to inspect and accept the ties, and that plaintiff could not recover

without alleging and proving facts showing that this condition had been performed, "or facts which would relieve the plaintiffs from the necessity of making and proving such allegation." This is now the law of the case.

Appellants contend that it is not sufficient to allege and prove that the railway company refused to act; that plaintiffs must go further, and show fraud or collusion. Appellants cite *Lane v. St. Paul F. & M. Ins. Co.*, 50 Minn. 227, 52 N. W. 649, as authority for this position. We need not consider whether, as laying down a rule of law applicable only to insurance cases, that case was properly decided. Certain it is that this court has held to the contrary rule in other cases. See *Starkey v. De Graff*, 22 Minn. 431; *Shaw v. First Baptist Church*, 44 Minn. 22, 46 N. W. 146; *St. Paul & N. P. Ry. Co. v. Bradbury*, 42 Minn. 222, 44 N. W. 1; *Langdon v. Northfield*, 42 Minn. 464, 44 N. W. 984. If the railway company was duly requested to act as arbiter, and refuses to do so, plaintiffs are not thereby precluded from recovering.

4. The contract between the parties is dated September 15, 1893, and provides that plaintiffs agree to sell and deliver to defendants "all ties purchased and handled by the said second party [plaintiffs] until September 1, 1894." On the authority of such cases as *Bailey v. Austrian*, 19 Minn. 465 (535), and *Tarbox v. Gotzian*, 20 Minn. 122 (139), appellants contend that this contract is void for want of mutuality, and therefore the amended complaint does not state a cause of action. Whether the contract is void for want of mutuality so far as it is not performed, we need not consider. So far as the contract is executed, it is enforceable. Plaintiffs sufficiently allege that they delivered to defendants all the ties purchased and handled by them during the time covered by the contract. If this is true, the title to these ties has passed to defendants (see *Fredette v. Thomas*, 57 Minn. 190, 58 N. W. 984), and they are liable to pay for them.

5. Whether the court below abused its discretion in overruling the demurrer to the amended complaint without giving defendants leave to answer is not before us. It does not appear that appellants ever applied for leave to answer, and there is not a sug-

gestion in the record brought up from the court below that they ever desired to answer this complaint.

This disposes of all the questions raised worthy of consideration, and the order appealed from is affirmed.

J. W. DAY and Others v. CHARLES GRAVEL.

May 3, 1898.

72	159
73	40

Nos. 10,867—(42).

Sale of Logs—Executory Contract—Transfer of Title—Damages.

A certain contract for the sale of logs construed; and *held*, that it was executory, and that the property in the logs did not pass to the buyer when the contract was made.

Appeal by defendant from an order of the district court for Morrison county, Baxter, J., denying a motion for a new trial, after a verdict in favor of plaintiffs for \$2,283.80. Reversed.

Calhoun & Bennett and John H. Rhodes, for appellant.

The contract was executory. *Thompson v. Libby*, 35 Minn. 443; *Martin v. Hurlbut*, 9 Minn. 132 (142); *Gasper v. Heimbach*, 53 Minn. 414; *Nicholson v. Taylor*, 31 Pa. St. 128; *Malone v. Minnesota Stone Co.*, 36 Minn. 325; *Elgee Cotton Cases*, 22 Wall. 180; *Note to Dunn v. Georgia*, 3 L. R. A. 199; *Note to 17 L. R. A.* 176. The question is one wholly of intention which is ordinarily a matter of fact to be found by the jury. 3 L. R. A. 199, note; *Engel v. Scott & H. L. Co.*, 60 Minn. 39; *Northern P. L. & M. Co. v. Kerron*, 5 Wash. 214; *Kost v. Reilly*, 62 Conn. 57.

Plaintiffs, having knowledge of the Bassett contract, would be liable for whatever loss defendant might suffer thereunder by reason of plaintiffs' failure to drive the logs. *Hadley v. Baxendale*, 19 Exch. 354; *Note in 6 Eng. Rul. Cas.* 617, 624; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619; *Griffin v. Colver*, 16 N. Y. 489; *U. S. v. Behan*, 110 U. S. 338, 344; *Cutting v. Grand Trunk Ry. Co.*, 13 Allen, 381; *Hurd v. Dunsmore*, 63 N. H. 171; *Buffalo B. W. Co. v. Phillips*, 64 Wis. 338; *Berkey & G. F. Co. v. Hascall*, 123 Ind. 502; *Abbott v.*

Hapgood, 150 Mass. 248; Blagen v. Thompson, 23 Ore. 239; Williston v. Mathews, 55 Minn. 422; Gasper v. Heimbach, *supra*; Crane v. Wilson, 105 Mich. 554.

Lindberg, Blanchard & Lindberg and *Choate & Merrill*, for respondents.

START, C. J.

On March 23, 1894, the parties hereto entered into a contract whereby the plaintiffs agreed to drive to the Mississippi river all logs on the Platte river then belonging to the defendant, bearing certain marks, for a stipulated price per thousand feet, payable when the logs were in the Mississippi. The contract was silent as to the time within which the plaintiffs should perform the contract on their part. This action was brought to recover the contract price for driving the logs.

There was no controversy between the parties as to the contract, or the number of feet of logs actually driven by the plaintiffs, but the defendant set up certain counterclaims. The second one was to the effect that the defendant, prior to entering into the contract with the plaintiffs, had contracted to sell the logs in question to the J. B. Bassett Lumber Company, to be delivered in the Mississippi river during the season of 1894, to be paid for when there delivered; that the plaintiffs had knowledge of this contract when they entered into the driving contract with defendant, and that they could reasonably and easily have driven all of the logs into the Mississippi during the season of 1894, but that they neglected and refused so to do; that by reason thereof the defendant was obliged to, and did, sell the logs for \$2,474 less than he would have received if the plaintiffs had driven them within a reasonable time, and that he thereby lost the use of the purchase price of the logs for one year; and, further, that by reason of such neglect and refusal the defendant was damaged \$3,599.67. On the trial this counterclaim was amended by setting out in full the Bassett contract, which is designated as "Exhibit E." The material provisions of Exhibit E are in these words:

"For and in consideration of the payments hereinafter named, the said party of the first part hereby sells and agrees to deliver to

said parties of the second part, into the Mississippi river at the mouth of the Platte river, as early in the spring of 1894 as the driving will permit, 2,200,000 feet, more or less, of pine logs; being all the logs cut by said first party and landed on the Platte river during the winter of 1893 and 4, and marked XA and XL, and stamped XL and XB. For and in consideration of the delivery of such logs as aforesaid, free of all incumbrance, the said parties of the second part agree to pay to the said party of the first part the sum of \$6.50 per M for all logs so delivered, in accordance with the scale of the surveyor general as made on the landing, in the following manner: \$2 per thousand feet on signing this contract (the receipt whereof is hereby acknowledged), \$1.25 per thousand feet when all of above-mentioned logs are delivered in the Mississippi river as above mentioned, \$1 per thousand feet sixty days thereafter, and the balance December 1st, after all logs have been so delivered." "It is hereby further agreed by said party of the first part that, when the second payment is made, he will have the logs specified in this contract transferred to the said parties of the second part, free of all incumbrance."

On the trial the defendant offered evidence tending to show that the logs might reasonably have been driven by the plaintiffs in the spring of 1894, and by July 1, and, according to the usual custom, should have been driven within that time, but that they were not driven until July, 1895. He also offered Exhibit E in evidence. The court received the evidence, against the plaintiffs' objections. The defendant then offered to show that he tendered the logs in 1895 to the J. B. Bassett Company under the contract, Exhibit E, that the company refused to take or pay for them, for the reason that they were not delivered in time; and, further, that the market value of the logs in 1895 was \$1.50 per thousand less than it would have been if the logs had been driven within a reasonable time in 1894. The court, on the objection of the plaintiffs, rejected this and all other evidence as to this counterclaim, and withdrew it from the jury. The record does not disclose the reason for the trial court's decision, but it is here conceded by both parties that the basis of the trial court's action was that Exhibit E was an executed contract, and by it the title to the logs vested at once in the Bassett Company, and therefore the defendant could not have lost the sale of the logs, and could not have been damaged in the manner

claimed. This is the only ground upon which the plaintiffs here seek to sustain the ruling of the trial court.

The precise question for our consideration is stated in the plaintiffs' brief thus:

"The question is, as above stated, did the title pass to Bassett? We claim that it did, and claim that the case of *Rail v. Little Falls Lumber Co.*, 47 Minn. 422, is in point, and that there is no difference in principle between the two cases."

Therefore this is the only question with reference to this counterclaim which we shall consider.

Technical defects or omissions in the allegations of the amended counterclaim, if any there are, must be deemed waived, for they are not urged in the brief of counsel, or otherwise. We have, then, as the sole question on this appeal, was Exhibit E an executed contract, and did the title to the logs, by virtue thereof, vest absolutely and immediately in the purchaser? We answer the question in the negative.

In contracts for the sale of goods, the test as to whether the title vests immediately in the buyer is the intention of the parties. The rules for ascertaining such intention are well settled, and are, so far as here material, as follows: (a) Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property, unless a different intention appears, passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed. (b) Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done. *Benjamin, Sales*, §§ 68-72. The cases of *Martin v. Hurlbut*, 9 Minn. 132 (142); *Thompson v. Libby*, 35 Minn. 443, 29 N. W. 150; *Restad v. Engemoen*, 65 Minn. 148, 67 N. W. 1146, and *Welter v. Hill*, 65 Minn. 273, 68 N. W. 26, affirm and illustrate the last rule stated; while the case of *Rail v. Little Falls Lumber Co.*, *supra*, declares and applies the first one.

This last case was clearly within the first rule, for the bill of sale included "the precise number of logs lying upon the bank, the mark which had been placed upon each, the total number of feet

therein according to the scale bill." It (the bill of sale) was a completed contract, and the intention of both parties that the property should pass to the buyer was obvious on its face. Not so with the contract in question, for upon its face it is not clear that the quantity of logs sold had been ascertained, or all of them landed and scaled, at the time the contract was made; that is, on March 15, 1894. Especially is this so in view of the oral evidence to the effect that the last of the logs were hauled, banked, and marked the last of March, or April 1, 1894.

But, whatever doubt there might otherwise be as to the intention of the parties to this contract, it is put at rest by their express agreement, which provides that the logs shall be transferred to the buyer when the second payment is made; that is, when the logs are delivered in the Mississippi river. It is claimed that this agreement is simply one for the transfer of the log marks. The language of the contract does not justify any such construction. Besides, the transfer of a log mark operates as a sale or transfer of all of the logs bearing such mark. If it was the intention of the parties that the absolute property in the logs should pass to the buyer as soon as the contract was signed, why should the transfer of the log marks be postponed to a future day? If the words of the contract, "When the second payment is made," defendant "will have the logs specified in this contract transferred," can be construed as referring to the marks, and not to the logs, still the words would clearly indicate that it was the intention of the parties that the title to the logs should not pass until the second payment was made.

Exhibit E was not an executed, but an executory, contract; and the title to the logs therein described did not pass to the buyer as soon as the contract was made. It follows that the trial court erred in rejecting the defendant's evidence as to his damages under his counterclaim, and in withdrawing from the jury all consideration of the counterclaim, and that a new trial must be awarded.

With reference to such trial, it is only necessary to add that, no time having been expressly agreed upon by the parties within which the plaintiffs were to drive the logs, the law implies a promise on their part to perform the contract within a reasonable time. The question of reasonable time is one for the jury. Rob-

erts v. Mazeppa Mill Co., 30 Minn. 413, 15 N. W. 680; Palmer v. Breen, 34 Minn. 39, 24 N. W. 322.

And, further, the defendant's damages are such only as directly and naturally result, in the ordinary course of events, from the plaintiffs' breach of their contract to drive the logs, and such as may reasonably be supposed to have been contemplated by the parties, when making the contract, as a probable result of its breach. Therefore, if the plaintiffs in this case, when they entered into the contract with the defendant, knew that his purpose in making the contract was to enable him to fulfill his contract with the lumber company, and there was a breach of plaintiffs' contract by them, whereby the defendant was prevented from performing his contract with the lumber company, he would be entitled to recover from the plaintiffs any loss of profits in the premises directly traceable to such breach. It is not practical to make any concrete application of this rule, except to say that, if the defendant establishes the facts essential to bring his case within the rule, he will be entitled to recover the difference between the market value of the logs in 1895 and the contract price he would have received if they had been driven in time to enable him to deliver them under his contract. If there were in fact no such diminution, he would be entitled to whatever he might have lost as interest on the agreed price. 3 Sutherland, Meas. Dam. §§ 906, 907; Paine v. Sherwood, 21 Minn. 225.

And, lastly, the trial court did not err in rejecting defendant's counterclaim of \$160 for use of his dams. The evidence disclosed no authority on the part of the defendant to levy such toll for logs navigating the river.

Order reversed, and a new trial granted.

STATE OF MINNESOTA ex rel. SISTERS OF THE ORDER OF ST. BEN-
EDICT and Another v. GEBHARD WILLRICH.

May 3, 1898.

Nos. 10,957—(28).

72 165
75 3**District Court—Jurisdiction—Certiorari to Probate Court.**

Held, that the district courts of the state have jurisdiction to issue writs of certiorari to probate courts, to review their judgments and decrees not appealable.

Probate Court—Decree Assigning Residue of Estate—Appeal—Certiorari.

Held, further, that a decree of the probate court assigning the residue of the estate of a decedent is not appealable, and certiorari will lie to review it.

Will—Devise of Real Estate—Construction—Vested Remainder in Fee.

A testatrix devised the residue of her real estate to her husband for life, and after his death it was to be divided equally between her two children, and then added this clause: "None of my children, or their heirs, shall have any right on my residue property until the death of my beloved husband." *Held*, that each of the children took a vested remainder in fee in the real estate as of the date of their mother's death.

Appeal by Frederick J. Will from an order of the district court for Ramsey county, Otis, J., directing that the final decree of distribution of the probate court for that county in the estate of Katherina Will be quashed. The facts are stated in the opinion. **Affirmed.**

Horton & Denegre, for appellant.

Theo. Bruener, for respondents.

START, C. J.

The district court issued a writ of certiorari to the judge of the probate court for the county of Ramsey, to review the final judgment or decree assigning the residue of the estate (consisting of real property) of Katherina Will, who died testate. A motion was made to quash the writ on the grounds that the district court had no jurisdiction to issue it, and, further, that the decree sought to be reviewed by the writ was appealable. The motion was denied,

the case heard on the merits, and the appellant appealed from an order quashing the decree of the probate court.

The question as to the jurisdiction of the district court to issue the writ is here urged. The claim that the district courts of the state have no power to issue writs of certiorari is without merit. Laws 1897, c. 7, vests the district courts of this state with concurrent jurisdiction to award writs of certiorari, when necessary to the exercise of the powers with which they are vested and to the due administration of justice. The district court is made a court of appeal from the probate court, by statute, pursuant to the constitution (G. S. 1894, § 4833); hence it has power to review the judgments and decrees of the probate court, by certiorari, in cases where no appeal is given by statute.

This brings us to the question whether an appeal lies from the decree here in question. G. S. 1894, § 4665, subd. 6, provides that an appeal may be taken from a decree by which a legacy or distributive share exceeding \$20 is allowed, or payment thereof directed or refused. If the decree in question is appealable, it is by virtue of this section.

The words "legacy or distributive share," in legal nomenclature, refer only to personal estate. They have, in law, a settled and definite meaning. A legacy is a gift of personalty by will, while a devise is a gift of real property by will. A statute of distribution is one which regulates the distribution of the personal estate of intestates, while a statute of descent is one which regulates the transmission of real estate of intestates by inheritance to their heirs. The words "legacy or distributive share," however, are sometimes used as referring to both real and personal property. Unless these words in this statute are used in this popular sense, it is clear that the statute cannot be construed as giving an appeal from a final decree of the probate court assigning the residue of the real estate of a decedent. Words used in a statute are to be construed according to the common and approved usage of the language, but technical words, which have acquired a particular meaning in the law, shall be construed according to such meaning. G. S. 1894, § 255.

In view of the settled legal meaning of the words "legacy or

distributive share," which has obtained for centuries, and the further fact that our Probate Code was framed by lawyers, it is clear that the words in this statute were not intended to be used in a loose and popular sense, as referring to both personal and real property.

But all doubt, if any there can be, upon this question, is put at rest by the history of the statute. Its original was R. S. 1851, c. 69, art. 3, § 43, subd. 4; and the words therein, "legacy or distributive share," necessarily have now the same meaning that they did when the statute was first enacted. That they were then used in their legal, and not popular, meaning, and that the statute did not give an appeal from a final judgment or decree assigning the residue of the estate of a decedent, is certain, because at the same time another statute was enacted, expressly giving an appeal from such judgment or decree. *Id.* c. 59, § 17. Both of these statutes were continued in force until the adoption of our Probate Code (see G. S. 1878, c. 49, § 13, subd. 4, and c. 56, § 18), wherein the former was continued, and the latter dropped, and nothing substituted for it. Why this was done, or why an appeal is now given from interlocutory orders of the probate court where only \$20 is involved, and denied in cases of final decrees assigning the residue of the estate of decedents, which involve the construction of wills and the statute of descent, also in many cases the transmission of great fortunes, leaving the aggrieved parties to the imperfect remedy of certiorari, we need not inquire. It is not our province to do so. We must accept the law as we find it, and not attempt any judicial legislation to supply supposed omissions.

The judgment in question was not appealable, and certiorari will lie to review it. This question was not called to the attention of the court in the cases of *In re Swenson's Estate*, 55 Minn. 300, 56 N. W. 1115, and *In re Terry's Estate*, 58 Minn. 268, 59 N. W. 1013.

The only question on the merits of this case relates to the construction of the will of Katherina Will, the material provisions of which are in these words:

"That is to say, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to wit: To my beloved husband, Ignatius Will, all my real estate during the term of his natur-

al life, and after his death to be divided equally among my children, Frederick J. Will and Minka E. Will, share and share alike. Also, all my personal estate, of whatever nature it may be, I give and bequeath to my above-named husband, to enable him to collect all moneys due to me, and appropriate the same to the best of his abilities. None of my children, or their heirs, shall have any right on my residue property until the death of my beloved husband, Ignatius Will."

The testatrix died August 2, 1892, leaving, her surviving, her husband and her son and daughter, the devisees in the will. The daughter, Minka E. Will, sometimes called M. Julia Will, died testate, unmarried and without issue, August 21, 1894. The relator is her sole devisee. The husband and father died intestate August 6, 1895; that is, about one year after the death of his daughter. On June 7, 1897, the probate court made its final decree, assigning the entire real estate of Katherina Will to the son, Frederick J. Will, to the exclusion of the relator, the devisee under the will of Minka E. Will, upon the ground that the latter's rights in the real estate under her mother's will were contingent, and were cut off by her death before that of her father. The district court held, in effect, that each of the children took by the will a vested fee in remainder, on the death of the mother, and hence the daughter died seised in fee of the undivided one-half of the real estate, subject to the life estate of the father, which on her death, by virtue of her will, vested in her devisee, the relator.

The district court was correct. It is apparent upon the face of the mother's will that it was written by a layman, and that it is not necessary to resort to any technical rules as to vested and contingent remainders to ascertain the intention of the testatrix. All that is necessary is to take the will by the four corners, and read it, in a common-sense way, from the standpoint of the testatrix. So reading it, the intention is clear. The testatrix intended to, and did, give to her husband a life estate in her real estate, and the remainder in fee to her two children. And being solicitous that her husband should not be disturbed in the enjoyment of his life estate by her children or their heirs, she added the unnecessary provision that none of them should have any right on the property until the death of her husband; that is, that until his death they must keep

off and not disturb him. This same will was, in effect, construed in accordance with the views here expressed in the case of *Will v. Sisters*, 67 Minn. 335, 69 N. W. 1090. We therefore hold that Minka E. Will died seised of an undivided one-half of her mother's real estate, subject to her father's life estate, which passed by her will to her devisee, the relator herein.

Order affirmed.

HALDOR E. BOEN v. FRANK J. EVANS and Another.

May 3, 1898.

Nos. 10,964—(53).

Amendment of Complaint—Bringing in Additional Defendant—Discretion—Statute of Limitations.

Held, that the trial court did not abuse its discretion in denying the plaintiff's motion to amend his complaint, and for leave to bring in a third party as defendant.

Appeal by plaintiff from an order of the district court for Otter Tail county, Baxter and Searle, JJ. Affirmed.

Hans Bugge and John Lind, for appellant.

In protecting its property, in collecting its debts, and generally in transacting business of a private character, a municipal corporation may, when not expressly prohibited, or when not otherwise prevented by statute, avail itself of all the rights and remedies afforded to an individual. *City of Buffalo v. Bettinger*, 76 N. Y. 393; *Town of Plainview v. Winona & St. P. R. Co.*, 36 Minn. 505; *Borough of Henderson v. County of Sibley*, 28 Minn. 515. The assistance of the courts may be invoked by a taxpayer where the officers of the municipality refuse to act. 2 Dillon, Mun. Corp. § 915; 2 Pomeroy, Eq. Jur. § 1095; *Rothwell v. Robinson*, 39 Minn. 1; *Hodgson v. Duluth, H. & D. R. Co.*, 46 Minn. 454; *Sinclair v. Board of Co. Commrs.*, 23 Minn. 404. The court has power to bring in the city as a party defendant. *Elmer v. Loper*, 25 N. J. Eq. 475; *Folkerts v. Power*, 42 Mich. 283; *Morrill v. Little Falls Mnfg. Co.*, 46 Minn. 260; *U. S. Ins. Co. v. Ludwig*, 108 Ill. 514; *Wood v. Lenawee*, 84 Mich.

521; *Sanger v. City*, 134 Mass. 308; *Lehigh C. & N. Co. v. Central R. Co.*, 42 N. J. Eq. 591; *Anderson v. Orient F. Ins. Co.*, 88 Iowa, 579; *Inhabitants of Winthrop v. Farrar*, 11 Allen, 398. Defendants can plead the statute of limitations only by answer, in which case plaintiff may allege and show facts suspending its operation. *Trebby v. Simmons*, 38 Minn. 508.

John P. Williams and Houpt & Baxter, for respondents.

The filing of the amended complaint and the bringing in of defendant city would be equivalent to the institution of a new action, for the action proper would be deemed commenced when the city is brought in. *Chadbourn v. Rahilly*, 34 Minn. 346. A party cannot be substituted without his consent. *Erschine v. McIlrath*, 60 Minn. 485. The doctrine of amendments should not be so extended. *Nugent v. Adsit*, 93 Mich. 462; *Segelke & K. Mnfg. Co. v. Hulberg*, 94 Wis. 106; *Flint & P. M. R. Co. v. Wayne Circuit Judge*, 108 Mich. 80. The cause of action in the amended complaint is a new and different action. *Belden v. State*, 103 N. Y. 1. Where plaintiff brings action against the wrong party, and after the statute has fully run amends his petition and brings in new parties as defendants, the new parties thus brought in may rely upon the statute of limitations as a defense. *Thompson v. School District*, 71 Mo. 495; *Bell's Appeal*, 115 Pa. St. 88; *Murphy v. Holbrook*, 20 Oh. St. 137; *Chicago, St. L. & P. R. Co. v. Bills*, 118 Ind. 221; *Leatherman v. Times Co.*, 88 Ky. 291. The court did not abuse its discretion in denying plaintiff's motion. *Sharon v. Sharon*, 75 Cal. 1; *People v. New York C. R. Co.*, 29 N. Y. 418, 431; *Murray v. Buell*, 74 Wis. 14, 19. A mere taxpayer, as such, is not entitled to maintain an action at law to recover corporate municipal property. *Sanderson v. Cerro Gordo Co.*, 80 Iowa, 89. It would be inequitable to permit plaintiff to maintain this action. *Farmer v. City of St. Paul*, 65 Minn. 176.

START, C. J.

Appeal by the plaintiff from an order denying his motion to amend his complaint, and to have the city of Fergus Falls made a party defendant.

This action was commenced September 23, 1896. The complaint

alleged that the plaintiff is and has been a taxpayer of the city of Fergus Falls, a municipal corporation, of which the defendant Evans was on September 23, 1890, and still is, treasurer; that on the day named the city council of such city, without authority of law, undertook to loan to Dawson Bell \$10,000 out of the current funds of the city, upon satisfactory security, with interest at the rate of two per cent. per annum, and directed an order to be drawn on the city treasurer for the amount of such loan; thereupon an order was so drawn for \$10,000, and delivered to the defendant Wright, but the order was not signed by the mayor and clerk of the city, as its charter required, and was wholly unauthorized and void; that thereafter, and on the same day, Wright presented the order to the treasurer, Evans, who paid to him the amount thereof, whereby the defendants converted \$10,000 of the city funds from the use to which they were intended, and thereby deprived the plaintiff and other taxpayers of their right to have the funds of the city expended only according to law. The prayer of the complaint was that the defendants be required to restore to the treasury of the city the amount so illegally taken therefrom, and for general relief.

It is to be noted that the action was commenced on the last day it could be commenced, and avoid the statute of limitations. On October 8, 1896, the defendants severally demurred to the complaint on the sole ground that the complaint did not state a cause of action. The defendants noticed this issue of law for trial and argument for May 18, 1897. Thereupon the plaintiff moved the court for leave to amend his complaint as to essential matters, and that the city of Fergus Falls be made a party defendant. On May 20, 1897, the trial court sustained the demurrer, with leave to the plaintiff to move, upon motion papers theretofore served and all proceedings in the case, for leave to amend his complaint and make the city a party; such motion to be submitted upon briefs. The motion was subsequently submitted, and was denied. The order of the trial court, omitting preliminary recitals, was in these words: "Ordered, that said motion be, and the same is hereby, denied." The motion was supported and opposed by affidavits of a number of citizens and taxpayers of the city of Fergus Falls. The

trial court, in a memorandum to its order, summarized the facts disclosed by the affidavits as follows:

"The facts upon which the plaintiff's motion must be determined, so far as is necessary in this note to refer to them, are substantially as follows: On or about the 23d day of September, 1890, the city of Fergus Falls loaned to one Dawson Bell the sum of ten thousand dollars, to enable him to purchase, repair and operate the Grand Hotel, in said city. * * * A note and mortgage to secure said loan were executed by said Bell to the First National Bank of Fergus Falls upon said hotel property; and said bank has duly made and filed with the clerk of said city a declaration of trust, fully securing to said city the principal and interest mentioned in said note and mortgage, interest upon which loan has been regularly and fully paid to said city. Neither of said defendants have ever appropriated, or attempted to appropriate, any part of the money so loaned, or the interest thereon, to their own use, or to dispose of it in any way, otherwise than as above stated. Said money, when loaned, was regularly drawn from said defendant Evans, as treasurer of said city; and, except as hereinbefore stated, neither of said defendants have had anything to do with said money, or the use thereof."

The motion was one addressed to the discretion of the trial court. It seems, however, to be urged on behalf of the plaintiff that the court denied the motion as a matter of strict legal right, and not as a matter of discretion. It appears from the court's memorandum that it was of the opinion that it did not possess the power to grant the motion, but that treating the question as one addressed to its discretion, the motion ought to be denied. The memorandum, however, is no part of the order, and the motion must be deemed to have been denied as a matter of discretion.

Hence the sole question to be here determined is whether the trial court abused its discretion in denying the plaintiff's motion to amend his complaint. The further question, whether the city of Fergus Falls ought to have been brought in as a party, depends upon the decision of the first question. If the plaintiff had the right to have his complaint amended so as to state a cause of action, then the city should be made a nominal party, almost as a matter of course, so as to be bound by the judgment. This would be necessary for the protection of the defendants. But, when made a party, the city may remain inactive. It is not bound to file a

cross bill and prosecute the action. On the other hand, if the complaint states no cause of action, and it is not to be amended, it is a matter of no concern to the plaintiff whether his application to make the city a party is granted or denied. Now, the demurrer to the original complaint in this case was not on the ground of defect of parties, but on the sole ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, so long as the order sustaining it is unreversed, the defendants are not bound to answer. This order is not before us for review, for the plaintiff has not appealed from it, and this case is to be determined upon the concession that the original complaint did not state facts constituting a cause of action. Hence, if the complaint is not amended, the plaintiff could not be prejudiced by a refusal to make the city a party. The plaintiff must first have a complaint which the defendants are bound to answer, before he is entitled to bring in the city as a party.

It may be conceded that the proposed amended complaint states a cause of action. The pivotal question then is, did the trial court abuse its discretion in denying the motion to amend the complaint? While that form of local patriotism which induces public officers to appropriate public funds for the promotion of private enterprises which will build up their towns is not only illegal, but reprehensible, and should meet with no encouragement from the courts, yet in this particular case there are equitable considerations which must not be lost sight of in determining the question whether the court abused its discretion in this case. In view of the facts disclosed by the record, which we have quoted from the memorandum of the trial court, and the further facts that for six years neither the plaintiff nor any other taxpayer objected to the transaction, during which time the city received and retained its benefits in the way of interest, and that the city still retains the mortgage, it seems inequitable now to require the defendants to pay to the city \$10,000, with accrued interest. It is not improbable that, if the plaintiff had seasonably objected to the transaction, the defendants might have indemnified themselves by securing a transfer of the mortgage to themselves, or secured a rescission of the whole

transaction. But he waits until the last day of the six years' limitation before acting.

Upon the whole record, we are of the opinion that the trial court did not abuse its discretion in denying plaintiff's motion to amend his complaint.

Order affirmed.

CANTY, J. (dissenting).

I cannot concur in the foregoing opinion. The original complaint stated a cause of action. The order sustaining a demurrer to it on the ground that it did not state a cause of action was erroneously granted. Failure to make the city a party was a mere technical omission. If the city had been made a party, it could not defeat the plaintiff's cause of action by refusing to answer, or by admitting in its answer that it had no claim against the other defendants. It might remain a passive party. And if the motion here in question had been granted, and the city had been made a party, it could not plead the statute of limitations for the purpose of preventing itself from receiving the money which would be awarded to it. Neither could the other defendants plead the statute of limitations for the city. Then it follows that the city would be merely a nominal party, and the statute of limitations did not prevent the granting of the motion to make it a party. This seems to be conceded. The majority admit that, if the complaint stated a cause of action, "then the city should be made a nominal party, almost as a matter of course, so as to be bound by the judgment."

Both the original and the proposed amended complaint state a cause of action, and the same cause of action. While the statute of limitations cannot prevent the bringing in of the city as a party defendant, it will totally defeat the action if the city is not brought in; and therefore the effect of the statute, if this action must be dismissed because the city is not made a party, has great weight in determining whether or not the court below abused its discretion in denying the motion to make the city a party. The majority seem to hold that, because the demurrer to the original complaint was wrongfully sustained before the motion to bring in the city was made, there was some sort of an estoppel, *res adjudicata*, or

law of the case, which justified the court in holding that the city need not be made a party, because the plaintiff had no cause of action. This is holding, in effect, that one erroneous ruling or interlocutory order of the court authorizes it, for the sake of consistency, to make a dozen more erroneous rulings or orders in the course of the proceeding. I cannot subscribe to any such doctrine. In my opinion, the court below abused its discretion in denying the motion to make the city a party.

The majority give as a reason for justifying the order of the court denying the motion to make the city a party that there are certain so-called equities which make it unjust to prosecute the defendants. In my opinion, there is no place for the consideration of such matters in such a case as this.

CHRISTOPHER JENSON v. GREAT NORTHERN RAILWAY COMPANY.

May 3, 1898.

Nos. 11,014—(66).

Master and Servant—Negligence of Master—Assumption of Risk by Servant—Injury to Fellow Servant.

While a servant impliedly assumes the risk of negligence by his fellow servants, yet he does not assume any risk on account of the negligence of the master, which is unknown to him; hence the fellow-servant rule has no application to a case where the master is negligent in employing or retaining in his service a careless and incompetent servant, who by his negligence injures his co-servant, who has no notice of his character.

Same—Sufficiency of Complaint—Demurrer.

The complaint herein is to the effect that the plaintiff was injured, while in the service of the defendant, by his incompetent and careless fellow servant (whom the defendant then knew to be such, but the plaintiff did not) carelessly and negligently causing an ax to fall upon him while each was in the line of his employment. *Held*, that complaint states a cause of action.

Appeal by plaintiff from an order of the district court for Otter

Tail county, Baxter, J., sustaining a demurrer to the complaint. Reversed.

H. Steenerson and *W. E. Rowe*, for appellant.

C. Wellington and *W. R. Begg*, for respondent.

START, C. J.

Appeal by plaintiff from an order sustaining a demurrer to his complaint.

The complaint alleges: That the defendant in the month of January, 1896, was engaged in the work of constructing an ice break, made of piles, for the protection of its bridge across the Red River of the North at Moorhead. That the plaintiff, who was one of a crew of six or eight men under the charge of a foreman, was at work on a lower cross girder connecting the piles, when the defendant, by its foreman, carelessly and negligently directed another workman belonging to the crew to go, with his tools, consisting of axes, saws and augers, upon a loose plank or staging above the plaintiff, and fasten the girders along the upper end of the piles, thereby rendering the place where the plaintiff was then working dangerous. That the defendant thereby, then and there, carelessly, negligently and unmindful of its duties to the plaintiff, caused a certain hand ax to fall and injure the plaintiff.

"That the workman so placed and set to work over the place where the plaintiff was working was an incompetent and careless workman, and so known to be by the defendant at that time, and was unknown to this plaintiff; and said workman, while so engaged, carelessly and negligently caused an ax lying loose upon the staging as aforesaid to fall down upon the plaintiff's head, and the plaintiff was thereby seriously wounded, and cut in his head, and his skull fractured."

If this complaint states a cause of action, it is only because it alleges that the plaintiff's fellow workman who carelessly dropped the ax which injured him was incompetent and careless, and that the defendant, knowing it, retained him in its service. This is so for the reason that the act of the foreman, whether he is to be regarded as a vice principal or otherwise, in directing the plaintiff's fellow workman to work with his tools on a loose staging over him, was not the direct cause of his injury.

The cause of the plaintiff's injury was the act of an incompetent and careless fellow servant in causing an ax to fall upon him. For this negligence the defendant is not liable if it was itself free from negligence in the premises; that is, if it did not knowingly retain such servant in its service. If it did, it is liable; for, while a servant impliedly assumes the risk of negligence by his fellow servants, yet he does not assume any risk on account of the negligence of the master which is unknown to him; and where the negligence of the latter in retaining an incompetent or careless servant combines with the negligence of such servant, and the two contribute to the injury of another servant, the master is liable. Or, in other words, the fellow-servant rule has no application to a case where the master is negligent in employing or retaining in his service an incompetent or careless servant, who by his negligence injures another servant, having no notice of such incompetency or carelessness. In such a case the master is liable for the act of the servant whom he negligently retains.

Therefore the complaint in this action states a cause of action if it shows on its face that the plaintiff was injured by the negligence of an incompetent and careless fellow servant, and that the defendant was negligent in retaining him in its service.

The complaint is to the effect that the plaintiff, while in the service of the defendant, was injured by his incompetent and careless fellow servant (whom the defendant then knew, but the plaintiff did not know, to be such), carelessly and negligently causing an ax to fall upon the plaintiff's head while each was in the line of his employment. The allegation that the fellow servant was careless necessarily implies that he was habitually negligent, for a careless man is one whose nature or habit is not to take ordinary care,—one who is negligent, unconcerned and heedless. The defendant, according to the allegations of the complaint, knowingly had such a man in its service, and knowingly subjected the plaintiff, who did not know that he was careless, to the risk of injury from the negligence of such a fellow servant, whereby the plaintiff was injured. Therefore the complaint states a cause of action.

Order reversed.

SPINK & KEYES DRUG COMPANY v. RYAN DRUG COMPANY.

May 9, 1898.

Nos. 10,979—(96).

Action against Drawer of Check—Complaint Alleging Notice of Dishonor.

While it is necessary, in action on a check against the drawer, to allege presentment of the check for payment, and its dishonor, it is not necessary to allege that notice of its dishonor was given to the defendant.

Appeal by defendant from an order of the district court for Ramsey county, Willis, J., overruling defendant's demurrer. Affirmed.

McLaughlin, Boyesen & Donohue, for appellant.

Notice to defendant of dishonor of the check was essential to create a cause of action. 3 Am. & Eng. Enc. 212; Tiedeman, Com. Paper, § 442; Wade, Notice (2d Ed.) §§ 729, 730; Harker v. Anderson, 21 Wend. 372.

Jayne & Helliwell, for respondent.

3 Am. & Eng. Enc. 211; Hoyt v. Seeley, 18 Conn. 353; In re Brown, 2 Story, 502, 516; Conroy v. Warren, 3 Johns. Cas. 259; Morrison v. Bailey, 5 Oh. St. 13; Kinyon v. Stanton, 44 Wis. 479; Howes v. Austin, 35 Ill. 396; Stewart v. Smith, 17 Oh. St. 82; Little v. Phenix Bank, 2 Hill, 425; Murray v. Judah, 6 Cow. 484, 490; Story, Prom. Notes, §§ 479, 498; Chitty, Bills, 515, note; 3 Kent, Com. (7th Ed.) 104, note; 2 Daniel, Neg. Inst. §§ 1586—1589; Pack v. Thomas, 13 Smedes & M. 11; True v. Thomas, 16 Me. 36,—were cited.

MITCHELL, J.

This was an action on a bank check payable on demand, of which the defendant was drawer and the plaintiff payee. The complaint alleged due and seasonable presentment of the check to the drawee bank for payment, and its dishonor, but did not allege notice to the defendant of its dishonor, or any excuse for not giving such notice. The defendant demurred to the complaint on the ground

that it did not state a cause of action, and from an order overruling its demurrer the defendant appealed.

The only question is whether it was necessary to allege in the complaint that notice of the dishonor was given to the defendant. We think that it was not, and that this logically follows from the points of difference between checks and bills of exchange, properly so called.

Defendant's counsel greatly rely on the somewhat noted case of *Harker v. Anderson*, 21 Wend. 372, in which Justice Cowen, in a very elaborate opinion, argued that a check is in all essential features a bill of exchange,—a doctrine long since thoroughly overturned. A check is in many respects so like a bill of exchange (payable on demand) that it has often been termed a bill in cases in which it was unnecessary to draw any distinction between the two classes of instruments. Indeed, checks may properly be called a species of bill of exchange. But there is a well-recognized distinction between bills and checks as to the legal consequence (between the holder and the drawer) of neglect and delay in presentment and notice of dishonor.

It is true that indorsers of checks stand on the same footing in reference to the effect of such neglect and delay as indorsers of bills. But the drawer of a bill and the drawer of a check stand upon a very different footing. In the case of a bill of exchange, negligence in respect to presentment or notice of dishonor absolutely discharges the drawer. But the drawer of a check is regarded as the principal debtor, and the check purports to be made on a fund deposited to meet it; and negligence of the holder in not making due presentment, or in not giving notice of dishonor, does not discharge the drawer, unless he has suffered some loss thereby, and then only to the extent of such loss. He is, at most, entitled only to such presentment and notice as will save him from loss. 2 Daniel, Neg. Inst. § 1587.

It seems to us that it logically follows that in a suit against the drawer it is not necessary to allege, as a part of the cause of action, notice of dishonor or the absence of loss by reason of the failure to give such notice. As it is a general rule of pleading that a party is not bound to allege what he is not bound to prove to establish his

cause of action, it seems to us that whether it is necessary to plead notice of dishonor depends upon the question, upon whom is the burden of proof as to loss or no loss by reason of neglect to give such notice? It strikes us that, upon both principle and reason, it should be held that loss by reason of negligent delay, either in making presentment or in giving notice of dishonor, is a matter of defense to be pleaded and proved by the drawer, instead of requiring the holder to allege and prove a negative as to a matter peculiarly within the knowledge of the drawer.

Many of the text-books and digests cite a line of cases in support of the proposition that, where there has not been due presentment and notice, the burden of proof is upon the holder to show that the drawer has sustained no injury. But a careful analysis of these cases will show that very few of them fully sustain so broad a proposition. In almost all of them it appeared that there had been negligent delay in presenting the check and that in the meantime the drawee bank had failed and closed its doors, and the remarks of the court were made with reference to that state of facts. It may be correct to hold that the changed condition of the drawee bank raises a presumption of loss or makes out a *prima facie* case of loss which shifts the burden of proof upon the plaintiff. But that is a very different thing from holding that the burden is on the plaintiff in the first instance to prove that the drawer suffered no loss.

In some of the cases usually cited as holding that, in an action against the drawer of a check, it is necessary to allege presentment and notice of dishonor, or a legal excuse for their omission, the only question really before the court was whether the holder of a check could have recourse upon it against the drawer until presentment and dishonor, and it was properly held that he could not, for until payment has been demanded and refused there is no breach of the drawer's contract. Moreover, all the cases hold that this demand on the drawee may be made any time before suit. But the matter of notice of dishonor stands on an entirely different footing, and constitutes no part of the plaintiff's cause of action. In none of the cases which hold that it is necessary to allege notice of dishonor do we find the question discussed at any length,

or any good reason given for the decision. In most of these cases the courts seem to have been influenced by the familiar rule pertaining to bills of exchange, and to have gone off on the exploded doctrine of *Harker v. Anderson*, supra, that a check is in all respects a bill of exchange.

As the question is merely one of pleading and practice, and not of general commercial law, and is one of first impression in this state, we feel at liberty to decide it according to what we deem sound principle. Our conclusion is that the complaint was not demurrable.

Order affirmed.

JOSEPH GREENGARD v. ST. PAUL CITY RAILWAY COMPANY.

May 9, 1898.

Nos. 10,992—(106).

72	181
81	419
72	181
82	20
72	181
88	807

Street Railway—Injury to Pedestrian—Contributory Negligence.

Held, that the evidence conclusively shows that plaintiff, in attempting to cross two parallel street-railway tracks (at a point not a street crossing), immediately behind a moving car on the track next to him, was guilty of negligence in not exercising reasonable care to ascertain whether a car was approaching from the opposite direction on the other track.

Appeal by defendant from an order of the district court for Ramsey county, Kelly, J., denying motions for judgment notwithstanding the verdict and for a new trial, after a verdict in favor of plaintiff for \$1,500. Remanded, with directions to enter judgment in favor of defendant notwithstanding the verdict.

The map referred to in opinion will be found on the following page.

Munn & Thygeson, for appellant.

C. D. O'Brien, for respondent.

MITCHELL, J.

The accident wherein plaintiff was injured occurred about eight o'clock in the evening of December 19, 1896, on Seventh street, between Locust and John streets, in the city of St. Paul, at a point from 100 to 150 feet west of the westerly line of the intersection of

Seventh and Locust streets. The defendant had two parallel tracks on Seventh street, its west-bound cars being operated on the north track, and its east-bound cars on the south track. The plaintiff lived and had a small store at No. 406, on the south side of Seventh street, about the middle of the block between Locust and John streets. He had lived there about 18 months, and was entirely familiar with the situation, and knew that the cars "always run pretty fast." He was 55 years old, and, so far as appears, was in full possession of all his faculties.

On the evening in question he went from his own store across to the north side of Seventh street, to No. 417, to get some money changed. No. 417 is somewhat further east than plaintiff's store. Hence he crossed Seventh street diagonally. All of this will be fully understood by reference to the map on the preceding page. On returning to his own place of business, the plaintiff followed the same route which he had taken in crossing from the south to the north. When he was about to cross the defendant's tracks he discovered on the north track an approaching west-bound car within a few feet of the easterly line of the intersection of Seventh and Locust streets, and too near for him to attempt to cross in front of it. He thereupon halted within a few feet (apparently three or four) of the north track, to let the car pass. Immediately upon its passing he started across, to use his own language, "right behind" the car; and when he had reached the space between the tracks he was struck by the "shoulder" of an east-bound car on the south track, and received the injuries complained of.

The witnesses estimated the speed of the west-bound car at not less than 6 or 7 miles, and that of the east-bound car from 12 to 17 miles, an hour. Some of the witnesses testified that they did not see any headlight on the east-bound car, but none of them were able to testify that there was none, and none of them seemed to have had their attention specially called to the matter. They would have been much more likely to notice so unusual a thing as a car running at night without a headlight than to notice the presence of it. Such slight negative evidence cannot overcome the positive testimony of the conductor that he lighted the headlight before he started, and that it was still burning when he completed his trip

after the accident. The inside of the east-bound car was illuminated with electric lights, except for a very few moments, when a new fuse was put in while the car was stopping at the crossing of Olive street, at least a block and a half west of the place of the accident. That part of Seventh street is approximately straight and level. Electric arc lights were suspended over it a block apart at each street crossing and were lighted at the time of the accident.

There were no obstructions to the view westward, unless it was the west-bound car. There was nothing to distract plaintiff's attention, unless it was the passing car. If he had looked west to ascertain if a car was coming from that direction, he could and would have seen the east-bound car anywhere within at least a block and a half of the place of the accident, except during the brief time when the west-bound car would obstruct his line of vision. His own witness, Kinghorn, who stood only a few feet west of him on the opposite side of Seventh street, and who had no better opportunities than plaintiff, saw the car at Olive street. Accepting the lowest speed of the west-bound and the highest speed of the east-bound car testified to by any of the witnesses, the latter must have been within a very short distance of plaintiff before the former obstructed his line of vision westward. Plaintiff testified that he looked to the west, and did not see any car coming from that direction. But it conclusively appears from the undisputed facts either that he did not look at all, or looked and saw the east-bound car, or that he did not look until the west bound car was in his line of vision, so that he could not see the other car.

Carefully examined, the testimony of the plaintiff amounts to a clear admission that the last of these hypotheses was the fact. Under a somewhat leading redirect examination, he attempted to modify this admission, but on recross-examination he virtually repeated it. The evidence, therefore, makes a case of an adult, in the full possession of all his faculties, with knowledge of the situation and the attendant risks, with ample opportunities to ascertain the approach of cars, with nothing to distract his attention, and without any necessity or even occasion for taking chances, rushing hastily across one track, at a point not a street crossing, in the immediate rear of a passing car, without knowing, or taking any reason-

able means to ascertain, whether a car was approaching from the opposite direction on the other track. If he had waited but a couple of seconds after the west-bound car passed him he could and would have discovered the approach of the other car; but, instead of doing this, he, in his haste to get back to his store, heedlessly and blindly rushed into a position of danger.

The fact that the east-bound car may not have given any signal of its approach to the John street crossing, over half a block away, does not in any way tend to excuse the plaintiff's conduct. It must also be borne in mind that this accident did not occur at a street crossing where pedestrians are to be expected, but at a place where they do not usually cross the street, and where those operating street cars are not ordinarily called upon to signal their approach. We are of opinion that the evidence of plaintiff's contributory negligence was conclusive, and as strong as, or even stronger than, the evidence in *Terien v. St. Paul C. Ry. Co.*, 70 Minn. 532, 73 N. W. 412.

The defendant moved the court to direct a verdict in its favor, and then moved for judgment notwithstanding the verdict, pursuant to Laws 1895, c. 320. The cause is remanded, with directions to the court below to enter judgment in favor of the defendant notwithstanding the verdict.

THEODORE SAFRANSKI v. ST. PAUL, MINNEAPOLIS & MANITOBA
RAILWAY COMPANY and Others.

May 9, 1898.

Nos. 11,031—(79).

**Injunction Bond—Failure of Principal to Sign—Liability of Sureties
—Cases Distinguished.**

Held, that the evidence proved that the sureties on a bond intended to be bound without the signature of their principal, although named as such in the body of the bond. *State v. Austin*, 35 Minn. 51, and *Martin v. Hornsby*, 55 Minn. 187, considered and distinguished.

Appeal by defendants from an order of the district court for

Stearns county, Baxter, J., granting a motion for a new trial. Affirmed.

Geo. H. Reynolds, for appellants.

G. W. Stewart, for respondent.

Hill and Sawyer intended to enter into a common law obligation and to be bound without the company's signature. *Parker v. Bradley*, 2 Hill, 584; *Cutter v. Whittemore*, 10 Mass. 442. When it appears directly or inferentially that the sureties intended to be bound without the principal signing, they are bound as if he had signed. *Van Norman v. Barbeau*, 54 Minn. 388; *County of Redwood v. Tower*, 28 Minn. 45; *Luce v. Foster*, 42 Neb. 818; *Bollman v. Pasewalk*, 22 Neb. 761; *Gray v. School District*, 35 Neb. 478; *Douglas Co. v. Bardon*, 79 Wis. 641; *Trustees of Schools v. Sheik*, 119 Ill. 584; *Goodyear D. V. Co. v. Bacon*, 148 Mass. 542; *Parker v. Bradley*, supra; *Herrick v. Johnson*, 11 Metc. (Mass.) 26; *Cutter v. Whittemore*, supra; *Lewis v. Stout*, 22 Wis. 234.

MITCHELL, J.

This action is upon a bond executed in an action brought by the St. Paul, Minneapolis & Manitoba Railway Company against the present plaintiff, to enjoin him from cutting timber and exercising other acts of ownership upon certain premises claimed to be owned by the railway company. It appears that upon the execution and filing of this bond a preliminary injunction was issued, which remained in force until the final determination of that suit in favor of the defendant therein (the present plaintiff). In the body of the bond (Exhibit C) the St. Paul, Minneapolis & Manitoba Railway Company is named as principal, followed by the names of Hill and Sawyer, but not expressly designated as sureties. At the foot of the bond there were three seals, and three lines for the signatures of the obligors. Hill signed on the first line (where the principal usually signs), and Sawyer on the second line. The railway company did not execute the bond at all. It appeared that, at the time the action was commenced and the bond executed, Hill was the president, and Sawyer the secretary and treasurer, of the railway company; also, that Sawyer, as such secretary and treasurer, verified the complaint.

The present action was tried by the court, which held, upon the authority of *State v. Austin*, 35 Minn. 51, 26 N. W. 906, and *Martin v. Hornsby*, 55 Minn. 187, 56 N. W. 751, that the sureties were not liable, because the principal had never executed the bond; but subsequently the trial judge, having concluded that he had committed error, granted plaintiff's motion for a new trial, and from that order the defendants appealed.

The doctrine to which this court committed itself in the cases referred to is that where a bond in its body purports to be the obligation of a principal and of sureties, but is incomplete on its face because not executed by the principal, it will be presumed, in the absence of any evidence to the contrary, that the sureties never intended to be bound without the execution of the bond by their principal, and hence that the bond upon its face shows no obligation on their part. But this is merely a disputable presumption of fact. As was said in *Martin v. Hornsby*, *supra*, at page 190:

"If sureties see fit to bind themselves absolutely, in any manner, without the signature of the principal, although named as such in the bond, they may do so, precisely as sureties may bind themselves, although one of their number, named as such in the obligation, has refused to sign it, as was the case in *Van Norman v. Barbeau*, 54 Minn. 388, 55 N. W. 1112."

An intention on the part of sureties to become bound without the signature of their principal may be proven by evidence dehors the bond itself. The evidence in this case, which was in no way rebutted, proved, *prima facie*, at least, such an intention. In the first place, Hill and Sawyer signed where the principal or principals usually sign such an instrument. But, what is more important than this, they were officers of the railway company. To Hill, as president and chief executive, was presumptively committed the authority to institute and direct the litigation of the company. It was also presumably his duty, and within the scope of his actual authority, as it clearly was within his apparent authority, to execute the bond in behalf of the company. It also appears from Sawyer's verification that he was active in commencing the suit for an injunction. They must have known that the railway company had not signed the bond, and presumably knew that it was

not intended or expected to sign it, although named in the body of the bond. They, or their authorized attorneys, used the bond in that condition, and obtained an injunction on the strength of it. Such evidence would not only justify, but require, a finding that the sureties intended to be bound by the bond in its present condition. Indeed, upon the state of facts disclosed by the record, we think they would be estopped to deny their liability on the bond. The trial court was right in granting a new trial.

Order affirmed.

JOHN E. ENGSTAD v. JENS SYVERSON and Others.

May 9, 1898.

Nos. 11,038—(89).

Administrator's Bond—Action by Creditor—Signature of Sureties Obtained by Fraud—Negligence—Estoppel.

In an action by a creditor of an estate on the administrator's bond, the breach assigned being the failure of the administrator to pay the claim upon demand after it had been allowed and ordered paid by the probate court, the sureties interposed as a defense that they were induced to sign the paper by the fraud of the judge of probate; that he presented to them a printed blank, and represented that it was merely a certificate of the relationship of the administrator to the deceased; and that they signed it without reading it, in reliance on these representations, and not knowing that it was a bond. The sureties were men of ordinary intelligence, able to read and write, and had ample opportunity to read the paper if they had so desired. The most casual inspection of it would have disclosed the fact that it was a blank administrator's bond. The administrator entered upon the duties of his office, reduced the assets to possession, and then removed from the state. *Held* that, conceding the facts to be as claimed by the sureties, their conduct was so grossly negligent that they are estopped to deny the execution or validity of the bond as against creditors or other beneficiaries of the estate.

Submission of Single Issue to Jury—Failure to Object—Waiver of Other Issues.

Where a case is tried upon the theory that the only issue is as to one question of fact, and the court, without objection by the party, instructs the jury that this is the only question submitted to them, and that their

verdict is to depend exclusively upon their determination of the question, the party thereby consents that the case may be tried and determined upon that one issue, and cannot afterwards urge that the evidence upon some other question of fact was insufficient to justify the verdict.

Action in the district court for Polk county against Jens Syver-son, as principal, and Tom O. Sundet and Ole O. Sundet, as sure-ties, upon an administrator's bond to recover from them \$200, the amount of a preferred claim allowed plaintiff by the probate court of Polk county against the estate in which the bond was given. From an order of the district court, Ives, J., granting a motion for a new trial, after a verdict in favor of plaintiff for \$205, plaintiff appealed. Reversed.

Ole J. Vaule, for appellant.

De Forest Bucklen and *H. Steenerson*, for respondents.

MITCHELL, J.

This was an action on an administrator's bond to recover the amount of a claim against the estate of the intestate.

The complaint alleged that the claim had been allowed and payment ordered by the probate court, and payment demanded of the administrator, but that he had not paid the same, although he had ample assets in his hands to do so. The evidence was conclusive that the claim had been allowed; that the court ordered its pay-ment forthwith; that this order had been served on the adminis-trator by mail, which he received at his residence in North Dakota, to which he had previously removed. As he was not only absent from the state, but had permanently removed therefrom, this was a sufficient demand of payment, assuming that any demand was necessary under the circumstances. The sureties denied the execu-tion of the bond, and that was the only issue submitted to the jury, which found a verdict for plaintiff.

The court, on motion of the defendants, granted a new trial, on the ground of errors occurring at the trial and of the insufficiency of the evidence; stating in his memorandum that his charge was not so full as it might have been, and that he was not sure but that the jury might have been misled by it. He might have cor-rectly added that all the errors, either of omission or commission,

in the charge were favorable to the defendants, and prejudicial to the plaintiff. He also stated in his memorandum that he was not entirely satisfied that there was sufficient evidence to warrant the verdict. In this the trial court was clearly mistaken. Upon the issue submitted to the jury, the evidence was such as not only to justify, but as to require, a verdict for the plaintiff.

The principal in the bond in suit was appointed administrator of the estate of his deceased wife in September, 1893, the time when the bond purports to be executed. He entered upon his duties and reduced to possession the assets of the estate to the amount of \$3,400, and removed from the state without disbursing or accounting for any part of it, unless it be about \$500, for funeral expenses, taxes and costs of administration.

The sureties admitted the genuineness of their signatures to the bond, but testified that when they went to the office of the probate court the judge of probate presented to them a printed blank, stating to them that it was no bond, but just a certificate that Syverson (the administrator) was the husband of his deceased wife; that, without examining or reading it, they signed it, in reliance upon the statement of the judge as to the nature and purpose of the instrument. There is no pretense that they were not men of ordinary intelligence, or that they were unable to read the paper, or that they had not ample opportunity to do so if they had desired. The most casual inspection of the printed blank would have quickly disclosed the fact that it was a blank form for an executor's or administrator's bond, and that the blanks in it could not have been filled in so as to make it an instrument of the character which they say the judge told them it was. They knew the blanks were not filled, and they must have known that it was necessary that they should be filled in order to make it a complete instrument for any purpose. Their story is extremely improbable and unreasonable. The judge of probate is dead, and the only living person, if any, who could contradict the testimony of the sureties, is their absent and defaulting principal. If bonds of this kind can be avoided on any such flimsy pretext, they are of very little value to creditors and heirs.

Even if their testimony is true, their negligence was so gross

and reckless that they are, as to creditors and heirs, estopped to deny that the instrument is their bond. This principle of equitable estoppel by conduct is the only one necessary to invoke. It must be remembered that the judge of probate is merely the officer of the law, and in no sense the agent of the creditors or others beneficially interested in the estate. Hence his fraud is not imputable to them.

On the trial the plaintiff proved the allowance of his claim, the order of the probate court directing its immediate payment, the service of the order on the administrator, the existence of assets in his hands, and then rested, without introducing any evidence that the administrator had not paid it. It is now claimed that the general rule that payment is an affirmative defense does not apply; that, in order to establish a breach of the conditions of the bond as against the sureties, the burden was on the plaintiff to prove nonpayment affirmatively; and that therefore the evidence was, for that reason, insufficient to justify the verdict. It is apparent from the record that no such point was raised or suggested on the trial. In their answer the defendants had not rested on a denial of the allegations of the complaint, but had set up as an affirmative defense that the claim had been paid; but they offered no evidence in support of it.

Aside from the facts of the allowance of plaintiff's claim, the court's order for its payment, the service of that order on the administrator, and the existence of funds in his hands, all the evidence offered by either party was directed exclusively to the issue as to the execution of the bond. That was the only issue submitted to the jury. The court expressly instructed the jury that this was the only question in the case, viz. "whether or not the parties signed this paper knowing it to be a bond." They were, in effect, instructed that their verdict was to depend entirely upon how they found on this question. To this charge the defendants made no objection, and took no exception. Their conduct amounted to a waiver of the defect, if any, in plaintiff's evidence upon the question of payment, and to a consent that the case should be tried and decided upon the issue as to the execution and validity of the bond. The point now made is evidently an afterthought,

and, without considering its abstract merits as a question of law, we are of opinion that the defendants cannot now be allowed to raise it in this court.

Order granting a new trial is reversed, and the cause remanded, with directions to the court below to enter judgment on the verdict in favor of the plaintiff.

BRIDGET FAY v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.

May 9, 1898.

Nos. 11,040—(167).

Railway—Removal of Snow from Yards—Negligence—Reasonable Care.

Reasonable care does not require railroad companies to remove all the snow from their yards, where cars are switched and trains made up. If they keep the surface of the snow practically level, and do not allow it to accumulate above the level of the rails, or in dangerous ridges or hummocks, or to form dangerous holes, they cannot be charged with negligence (at least, unless under very special and peculiar circumstances) for not removing the snow, or covering it with ashes or cinders.

Same—Injury to Switchman—Assumption of Risk.

Held, also, that in this case the deceased must, or, in the exercise of ordinary care, should, have known of the slippery condition of the surface of the snow, and the risks incident to such condition.

Action in the district court for Watonwan county by the administratrix of Owen F. Fay, deceased, to recover \$5,000 by reason of the death of her intestate while employed by defendant. The facts are stated in the opinion. From an order, Severance, J., denying a new trial, plaintiff appealed. *Affirmed*.

Seager & Lobben and W. S. Hammond, for appellant.

L. K. Luse, Lorin Cray and Thomas Wilson, for respondent.

MITCHELL, J.

This was an action to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant. When the plaintiff rested, the court, on motion of the defendant,

dismissed the case, on the ground that the plaintiff had failed to establish a cause of action. From an order denying a new trial, the plaintiff appealed.

There is no dispute as to the evidentiary facts. The deceased was a yard switchman in defendant's yard at St. James, and met his death about 9 p. m. on January 27, 1897, by being run over by the cars while attempting to cut off a car from a moving train which was being made up in the yard at that time. The claim of the plaintiff is that the accident resulted from deceased slipping on the snow or ice, and falling under the wheels of the moving cars.

Under the evidence, the only possible claim upon which any negligence of the defendant can be predicated is the slippery condition of the yard, by reason of the presence of snow and ice. The snow had not drifted or piled up; neither were there any artificial piles or banks. The natural fall of snow had been trodden down to about the level of, or a little below, the tops of the rails. There were no holes or hummocks, but its surface was substantially level throughout the yard, except that the snow had been removed just inside the rails, where the flanges of the wheels run. This rendered the surface of the snow between the rails of the several tracks somewhat higher in the center than at the rails, but this fact in no way conduced to the accident, for the reason that the deceased was at the time outside the rails, in one of the spaces between tracks.

While the occupation of switchmen in the railroad yard is a hazardous one, and railroad companies should exercise a degree of care commensurate with the risks, reasonable care does not require them to remove all the snow from their yards. In this climate it would be practically impossible to do so, and we apprehend that no company ever attempted it. So far as slipperiness is concerned, a partial removal of the snow would be useless, for the surface of snow half an inch deep would be just as slippery as if it was six inches deep. So long as it is not allowed to accumulate higher than the rails, and the surface is kept practically level, and the snow not permitted to accumulate in dangerous hummocks or ridges, or to contain dangerous holes, no negligence can be charged

against the company, unless under very special and peculiar circumstances, because they have not removed the snow.

Counsel for the plaintiff does not really claim otherwise, but his contention is that a railroad company ought (at least, where the surface of the snow is very slippery) to place ashes or cinders upon it,—at any rate, that this is a question for the jury. Aside from other objections to adopting any such method, it is practically impossible, in view of the number and size of railroad yards, and the frequent falls of snow and changes of weather in our northern winters. We hardly think that any railroad company has ever attempted, or was ever expected, to do anything of this kind.

But, even if the negligence of the defendant would otherwise have been a question for the jury, the action was properly dismissed because it conclusively appears that the deceased must, or, in the exercise of reasonable care, should, have known the exact condition of the yard, and all the risks incident to such condition. He was an experienced railroad man. He had been in the employment of the defendant for quite a number of years as a brakeman on trains running in and out of this yard. He had been steadily employed in it as a yard switchman from the previous October up to the time of his death. During most of this period his work was in the daytime. During that winter the yard had been in substantially the same condition as when he was killed. He was therefore perfectly familiar with the situation. He must have known that the defendant had not been in the habit of removing the snow, or covering it with anything to obviate the slipperiness of its surface. He had been at work all the day previous to the one on which he was killed. The presence of the snow and the condition of its surface were perfectly obvious to the senses, and the danger or risk from slipping and falling must have been fully appreciated by any one of sufficient intelligence to understand the operation of the simplest laws of nature.

It appeared from the evidence that it had rained and sleeted on January 26th and thawed during the forenoon of the 27th, and then turned cold and froze in the afternoon of the latter day; and it is urged that, as he was not at work during that day, he did not know, or might not have known, of the increased slipperiness of the sur-

face of the snow, resulting from the changes of the weather. But he must have known of these changes, for he was at work in the yard all day on the 26th, in the sleet and rain; and, when he went out to work on the evening of the 27th, he must then, if not sooner, have discovered the change in the weather, and must have been perfectly aware of the effect of such a change according to the laws of nature.

It is unnecessary to consider the correctness of the action of the court, referred to in the first and second assignments of error, in excluding or admitting evidence, for the reason that, whether admitted or excluded, the evidence could not have changed the result. Order affirmed.

MAGGIE JOHNSON v. A. M. EKLUND and Others.

May 9, 1898.

Nos. 11,096—(69).

78	195
78	76

Contract for Sale of Land—Default in Payment—Election to Declare Void—Notice—Provision that Assignment Shall be Invalid unless Countersigned by Vendor.

In an executory contract for the sale of real estate, the purchase money being payable in instalments, it was provided that the times of payment were of the essence of the contract; that, in default of strict and literal performance, the vendor should have the right to declare the contract null and void; that notice of the election of the vendor thus to declare the contract null and void might be served by mail, addressed to the vendee or his assigns at a specified post office. The contract further provided that no assignment of it should be valid unless countersigned by the vendor. *Held*, that a default in payment by the vendee would not ipso facto render the contract null and void; that an election on part of the vendor, and notice of that election in the manner provided in the contract, were necessary; that there was no evidence that the vendor had elected to declare the contract void, or that he had ever served notice of any such election in the manner provided in the contract. The provision that no assignment should be valid unless countersigned by the vendor was merely collateral to the main purpose of the contract, and designed as a means of securing or enforcing payment of the purchase money; and the fact that an assignment had not been

countersigned was no defense to an action by the assignee to compel specific performance, where the vendor has been paid or tendered the whole of the purchase money.

Action for specific performance of a contract for the sale of land and to determine the adverse interests of defendants therein. From a judgment in favor of plaintiff, entered in the district court for Kittson county pursuant to the findings and order of Ives, J., defendant Matilda Brenberg appealed. Affirmed.

H. Steenerson, for appellant.

Albert Johnson, for respondent.

MITCHELL, J.

On November 9, 1892, Eklund sold and agreed to convey to Swanson two lots in the town of Hallock for \$125, payable, \$10 immediately, \$60 November 1, 1893, and \$55 November 1, 1894. Time was made the essence of the contract, which provided that, in case of the nonperformance of any of its conditions, the vendor should have the right to declare the contract null and void, and that his election to do so might be made by depositing in the post office at Hallock a notice to that effect, directed to the vendee or his assigns at the post office specified at the foot of the contract (which was Hallock). The contract further provided that "no assignment of the premises * * * shall be valid unless the same shall be indorsed hereon or permanently attached hereto, and countersigned by A. M. Eklund, Jr., or his authorized agent."

At this time Eklund resided in Hallock. Swanson made the cash payment of \$10, entered into possession of the premises under the contract, and built a house. On May 1, 1893, Swanson assigned the contract to the defendants Johnson and Nils Brenberg. This assignment was countersigned by Eklund. On September 7, 1893, Eklund conveyed the land subject to the contract to the defendant Sundberg. On November 1, 1893, Johnson and Brenberg paid to Sundberg the instalment of purchase money then maturing, of \$60 and interest. April 3, 1894, Johnson and Brenberg, for the consideration of \$430, sold and assigned the contract and all their interest in the premises to the plaintiff. This assign-

ment was never countersigned by either Eklund or Sundberg, and was never presented to either of them for that purpose.

Plaintiff took possession of the premises, and moved her personal effects into one of the rooms of the house, but permitted Swanson (who had continued all the time in the actual possession of the premises) to remain in the occupancy of the remainder of the building. The plaintiff testifies that the agreement between her and Swanson was that during his occupancy he was to pay her rent. This Swanson denies; but the evidence is undisputed that Swanson remained in possession by the consent of plaintiff, and with knowledge of her claims.

In October, 1894, plaintiff, desiring to pay the last instalment of purchase money due on the contract, and to obtain her deed, deposited the money for that purpose with the cashier of a bank in Redwood Falls, with instructions to attend to the matter for her. Prior to this, Eklund had removed from the state. About October 19, the cashier wrote to Sundberg that the contract and money were in his hands, and that the plaintiff was ready to pay the balance due on the contract when deed and abstract of title were furnished. Sundberg replied that he had sold his interest, and advised the cashier to write to one Dure, who resided in Hallock, and who, it appears, was acting as agent for both Eklund and Sundberg. As soon as the cashier received this letter, he wrote to Dure substantially what he had written to Sundberg. The exact date of the letter to Dure does not appear, but, according to the due course of mail, it presumably was before November 1. Dure made no reply.

About a month afterwards, plaintiff discovered that, on November 6, Dure, as attorney in fact for Sundberg, had, for the alleged consideration of \$150, executed a deed of the lots to the defendant Matilda Brenberg, the wife of defendant Nils Brenberg. This transaction was conducted on behalf of Matilda by her husband, Nils, who, it will be remembered, was one of the parties who assigned the contract to plaintiff.

Dure's claim is that, as agent for Sundberg, he had canceled this contract for default in payment of the instalment of purchase money due November 1, 1894. The court finds that the contract

never has been canceled, and the evidence amply sustains the finding. A default in making a payment would not, *ipso facto*, cancel the contract. It could only be canceled, if at all, on the election of the grantor, exercised in the way provided for in the contract itself. When interrogated as to what he did by way of canceling the contract, Dure testified that he addressed a letter to Johnson and Brenberg that he wanted payment, or the contract would be canceled, and that about two weeks afterwards, not having heard from them, he canceled the contract, and, in about ten days after that, he wrote them that he had canceled it. This testimony is inconsistent with the fact that, as attorney for Sundberg, he executed a deed to Mrs. Brenberg, and delivered it to her husband six days after the last instalment of purchase money fell due. His excuse for not notifying plaintiff is that he knew nothing of the assignment to her. All the circumstances in evidence cast great doubt upon the truth of this statement, and the whole affair has the appearance of an unconscionable scheme on part of Nils Brenberg and Dure to cut the plaintiff out of her property by means of a pretended cancellation of the contract.

Although the plaintiff did not make formal tender of the money until February 18, 1895, yet the court finds that on November 1, 1894, she was ready, able and willing to pay according to the terms of the contract, and made inquiry and diligent effort to find some place to make such payment, and was unable to find any person to whom or any place at which the same could be made. This finding is in its spirit supported by the evidence. It may be, and probably is, true that plaintiff was technically in default in not tendering the money to Sundberg or Dure personally, at Hallock, on November 1, instead of resorting to correspondence by mail. But, under the facts of this case, equity would relieve her from this default, and would never permit the contract to be thus summarily canceled upon any such technical ground.

But, even assuming that the grantor or his assigns had the right to cancel the contract, yet if a party proposes to exact his pound of flesh, and stands upon the letter of the contract, the courts will hold him to an equally strict compliance with its terms. The mode of exercising the vendor's election to cancel provided for in the

contract is depositing in the post office a notice addressed to the vendee or his assigns, at "Hallock, county of Kittson, state of Minnesota." Dure was unable to say where the letters of Johnson and Brenberg were directed. It was evident, however, that it was not at Hallock. Moreover, there is no evidence that Sundberg ever elected to cancel the contract, or that he ever authorized Dure to cancel it. The most that can be claimed from the evidence is that Sundberg authorized Dure to receive the purchase money, and execute a deed of the premises. It should be stated in this connection that Mrs. Brenberg is in no position to assert any superior equities on the ground that she is an innocent purchaser for value. Her agent, her husband, who made the purchase for her, had full knowledge of plaintiff's rights.

2. We shall not enter into the consideration of the questions discussed by counsel as to the validity of the provision in the contract that no assignment of the premises should be valid unless countersigned by Eklund, the vendor, or, if valid, whether it was terminated and waived by Eklund's consent to the first assignment, or as to the effect of Eklund's having parted with all interest in the premises by his conveyance to Sundberg.

It will be noted that there is no provision that an assignment without Eklund's written approval should forfeit the contract, or give the vendor the right to declare it forfeited; and certainly the courts will not read any such right into the contract by implication. There is nothing personal in the nature of the contract. All that the vendor was interested in was the payment of the purchase money at maturity. If he received this, it was wholly immaterial to him who paid the money or who got the land. At most, this stipulation against an assignment is merely collateral to the main purpose of the contract, designed as a means of securing and enforcing performance of what was undertaken by the vendee, to-wit, the prompt payment of the purchase money. When the vendor has received all his purchase money, he has received all that he is entitled to, and all that the provision against an assignment was intended to secure. Under such circumstances, the fact that the assignment to plaintiff was not countersigned by the

vendor is no defense to an action by her to compel a conveyance.
Grigg v. Landis, 21 N. J. Eq. 494.

Judgment affirmed.

STATE OF MINNESOTA *ex rel.* JAMES N. MARR *v.* FRED STEARNS.

May 11, 1898.

Nos. 11,037—(31).

Senate—President pro tempore Becoming Lieutenant Governor—Vacancy in Office of Senator.

The president pro tempore of the state senate does not cease to be a senator when he becomes lieutenant governor by reason of a vacancy in the office of governor, and a corresponding vacancy in the office of lieutenant governor.

Laws 1895, c. 168 — Taxation of Railroad Lands—Submission to Electors—Constitution.

Held, that Laws 1895, c. 168, relating to the taxation of railroad lands, was duly enacted, and properly submitted at the general election of 1896 to the electors for adoption and ratification, as required by the constitution.

Public Law—Ratification by Majority Vote of Electors—Judicial Notice of Number of Ballots Cast.

The existence of a public law, whether it be in the form of a statute or a constitutional amendment, is a fact of which courts must take judicial notice. If, as in this case, its validity depends on the fact whether it was ratified by a majority vote of all the electors voting at the election at which it was submitted, the court will take judicial notice of the number of ballots cast at the election, and the number cast for the law, and inform itself as to such facts by resorting to the election returns and records in the office of the secretary of state, or in the offices of the several county auditors, or by any other means it deems safe and proper.

Laws 1895, c. 168—Ratification by Majority Vote of Electors.

Held, that the law here in question was adopted and ratified by a majority of all the electors voting at the election at which it was submitted.

Same—Railway—Gross-Earnings Tax Validated by Const. art. 4, § 32a—Impairing Obligation of Contract.

The statutes of this state (enacted subsequently to the adoption of the

constitution) providing for a commuted system of taxation of the property of railroad companies, by permitting them to pay an annual gross-earnings tax, in lieu of the taxation of their property on the basis of a cash valuation, were unconstitutional until validated by the constitutional amendment of 1871 (article 4, § 32a). Such validation was a qualified one, the right to repeal or amend the statutes being reserved; hence Laws 1895, c. 168, does not impair the obligation of any contract, and is constitutional.

Upon the petition of the relator, a resident and taxpayer of the county of Aitkin, the district court of that county granted him an alternative writ of mandamus requiring the county auditor of Aitkin county to place upon the tax list certain parcels of land described in the petition, to extend against such parcels their just proportion of taxes, and to cause the taxes to be collected, or to show cause why he had not done this. The matter having been duly submitted, the court, Holland, J., filed its findings and order that the relator was entitled to the relief prayed for, and thereupon judgment was entered making the alternative writ peremptory and directing the respondent as county auditor to place the lands described upon the tax list for 1897. From this judgment the respondent auditor appealed. Affirmed.

Hadley & Armstrong, for appellant.

Laws 1895, c. 168, was never passed by the state senate by the necessary vote of a majority of the members elected to that body. Const. art. 4, § 13. The courts may have recourse to the journals of the houses of the legislature to ascertain whether or not a law has been duly passed as provided in the constitution. *Supervisors of Ramsey Co. v. Heenan*, 2 Minn. 281 (330); *State v. City of Hastings*, 24 Minn. 78; *State v. Gould*, 31 Minn. 189; *State v. Peterson*, 38 Minn. 143; *Lincoln v. Haugan*, 45 Minn. 451. Mr. Day was lieutenant governor and was not a senator. Const. art. 5, § 6. The two offices are incompatible, and on his becoming lieutenant governor, the office of senator from the sixth district became vacant and remained vacant until his successor was elected and qualified. Const. art. 4, § 9. When a person holding one office accepts a new office incompatible with the one already held, the acceptance of the second office vacates the office previously held.

King v. Tizzard, 9 B. & C. 418; Stubbs v. Lee, 64 Me. 195; State v. Goff, 15 R. I. 505; Kerr v. Jones, 19 Ind. 351; People v. Nostrand, 46 N. Y. 375, 381; People v. Hanifan, 96 Ill. 420; State v. Hutt, 2 Ark. 282; Scott v. Strobach, 49 Ala. 477. The constitution prohibits the lieutenant governor from voting as senator. Const. art. 3, § 1; art. 4, § 1; art. 5, § 1. The stability of our peculiar form of government depends largely upon the separation of the three functions of the government, the executive, the legislative and the judicial. Story, Const. § 520; Bryce, Am. Com. 212; Minnesota Const. Debates, 185-202; De Chastellux v. Fairchild, 15 Pa. St. 18; People v. Draper, 15 N. Y. 532; Cooley, Const. Lim. 44, 78; Const. art. 13, §§ 3, 4. If the lieutenant governor may vote as a de-facto senator, there is nothing in our constitution that prevents the governor from doing the same thing under like circumstances. State v. Francis, 26 Kan. 724.

Laws 1895, c. 168, was not legally submitted to the people for ratification and adoption at the general election of 1896. Const. art. 4, § 32a. This constitutional provision must be complied with in a reasonable manner. The question as to the adoption or rejection of the act in question must be submitted to the voters of the state in such a manner that a person of ordinary intelligence will understand what he is doing when he votes upon the question. Laws 1893, c. 4, § 28 (G. S. 1894, § 33). Even assuming that the law had been properly enacted by the senate and properly submitted to the people at the election, it was not adopted or ratified by the popular vote. The printing of the law with Laws 1897 is no evidence of the adoption and ratification of the law. The statutes having provided how the result of the election shall be ascertained and certified, the court will take judicial notice of the result of the canvass of votes made in accordance with the law. G. S. 1894, §§ 1, 169, 170, 171, 178, 179; Laws 1895, c. 168, § 4. The certificate of the state canvassing board does not give the total number of ballots cast nor the total number of electors voting at the election. It does not purport to determine the result of the vote upon the law in question, but merely makes the statement that "For taxation of railroad lands 'Yes' received 235,585 votes; 'No' received 29,530 votes." The language used in the constitu-

tion, "a majority of the electors of the state voting at the election," means a majority of all the electors who vote at the election upon any matter, and not a majority of those who vote upon this particular question. *Taylor v. Taylor*, 10 Minn. 81 (107); *Dayton v. City of St. Paul*, 22 Minn. 400; *Smith v. Board of Co. Commrs.*, 64 Minn. 16. The total number of ballots cast, which would be the same as the total number of electors voting at the election, is not contained and cannot be made out from the certificate of the state canvassing board.

Laws 1895, c. 168, does not apply to the granted lands of the St. Paul & Duluth Railroad Company, for the reason that there was prior to its enactment a binding contract between the railroad company and the state, that the railroad company should pay a certain percentage of its gross earnings to the state, and that such payment should be in lieu of all other taxation on those lands as long as they were owned by the company. Hence an application of chapter 168 to those lands would be a breach of that contract in violation of the constitution of the state and also of the constitution of the United States. *Sp. Laws 1865, cc. 2, 8*. When there are no constitutional limitations upon the legislature of a state, it may make contracts with corporations or individuals, either that certain property shall be exempt from all taxation, or that a certain fixed sum shall be paid in lieu of all other taxation, and such contracts are irrevocable. *First Div. St. P. & P. R. Co. v. Parcher*, 14 Minn. 224 (297); *State v. Winona & St. P. R. Co.*, 21 Minn. 472; *City of St. Paul v. St. Paul & S. C. R. Co.*, 23 Minn. 469; *St. Paul & C. Ry. Co. v. McDonald*, 34 Minn. 195; *County of Stevens v. St. Paul, M. & M. Ry. Co.*, 36 Minn. 467; *Cooley, Const. Lim.* 127; *State v. Wilson*, 7 Cranch, 164; *Gordon v. Appeal Tax Court*, 3 How. 133; *State Bank v. Knoop*, 16 How. 369; *Jefferson B. Bank v. Skelly*, 1 Black, 436; *University v. People*, 99 U. S. 309; *Asylum v. New Orleans*, 105 U. S. 362; *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 662. All the provisions of *Sp. Laws 1865, c. 8*, are intended to be binding upon the state and not to be changed without the consent of the railroad company. *State v. Luther*, 56 Minn. 156. The act shows consideration from the company to the state. If *Sp. Laws 1865, cc. 2, 8*, were invalid for violation of

Const. art. 9, §§ 1, 3, they were validated by the constitutional amendment of 1871. *State v. Luther*, supra.

C. W. Bunn, for appellant. (With respect to lands owned by Northern Pacific Railroad Company.)

Sp. Laws 1865, c. 8, and Sp. Laws 1870, c. 65, constitute a contract between the Northern Pacific and the state, and Laws 1895, c. 168, if held to have been properly passed, is void because it impairs the obligation of that contract. These laws did not violate Const. art. 9, §§ 1, 3. The system of providing for taxation of railroad lands through payment of a percentage of the gross earnings of the road in lieu of all other taxes was universally in vogue in territorial times before the adoption of the constitution, and after that date the state legislatures invariably assumed that they continued to possess the same power, whether the railroad grant was the absolute property of the state or granted to the state by congress. This was the practice, not only as to old grants adopted before the constitution, but also as to new grants, both state and congressional, made after that date. *State v. Luther*, 56 Minn. 156, 163. A constitution may acquire a construction or meaning by universal and long-continued practice which should be held controlling. *Carson v. Smith*, 5 Minn. 58 (78); *Green v. Knife Falls B. Corp.*, 35 Minn. 155; *City of Faribault v. Misener*, 20 Minn. 347 (396); *Ames v. Lake Superior & M. R. Co.*, 21 Minn. 241, 288.

Sections 1 and 3 of article 9, read technically and literally, are contradictory. Section 1 says that all taxes shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the state. Under this section the legislature is clearly given the right to determine what property shall bear the burden of taxation, to classify property, and to levy taxes upon one class of property by a different rule from that applied to other classes of property; it may exempt from all taxation any property or any class of property, or it may for example tax improved property by a percentage on rental or income, unimproved property directly by ascertaining its value. This constitutional provision is the com-

mon one adopted in the constitutions of a dozen or more western and southern states. On the other hand, section 3 did not accompany in any of the other states constitutional provisions similar to those contained in section 1. Section 3 was adopted with slight changes from Ohio. See Debates Constitutional Convention, 1857. But in Ohio section 3 was the only provision touching the subject. Our constitutional convention adopted section 1, which is substantially the constitution of Wisconsin, Illinois, Iowa, Missouri, Kansas and other states, accompanied with section 3, taken from Ohio; and taken, it may be noted, after a well-known decision of the Ohio supreme court holding that it was unconstitutional to provide for a deduction of debts against credits. *Exchange Bank v. Hines*, 3 Oh. St. 1. In this state the two provisions must be construed together, both as operative and as modifying each other. Some construction must be adopted which will give the fullest effect to both section 1 and section 3. While it must be admitted, as decided in *LeDuc v. City of Hastings*, 39 Minn. 110, that the legislature cannot exempt any property, except of classes enumerated in section 3, still it remains to be decided whether, taking both sections together, the legislature is absolutely bound to assess all property by a specific, direct appraisal of its value in money. Section 3 is not self-executing but is directory to the legislature. And therefore it may well be held that section 3 was not intended to overrule section 1 so far as concerned the power of the legislature to determine where the burdens of taxation should be placed (of course, without unjust discrimination) and to classify property into different classes for the purposes of taxation. See *Wisconsin C. R. Co. v. Taylor Co.*, 52 Wis. 37; *Trustees of Griswold College v. State*, 46 Iowa, 275; *Missouri R. F. S. & G. R. Co. v. Morris*, 7 Kan. 210; *Francis v. Atchison, T. & S. F. R. Co.*, 19 Kan. 303; *Louisiana St. L. Co. v. New Orleans*, 24 La. An. 86; *New Orleans v. Kaufman*, 29 La. An. 283; *New Orleans v. Davidson*, 30 La. An. 554; *New Orleans v. Fourchy*, 30 La. An. 910; *People v. Auditor-General*, 7 Mich. 84; *State v. Runyon*, 41 N. J. L. 98; *Kittanning Coal Co. v. Com.*, 79 Pa. St. 100; *Mississippi Mills v. Cook*, 56 Miss. 40; *Illinois Cent. R. Co. v. McLean*, 17 Ill. 291; *Hunsaker v. Wright*, 30 Ill. 146; *State v. County Ct.*, 19 Ark. 360; *St. Louis, I. M. & S. Ry. Co. v.*

Berry, 41 Ark. 509; Arkansas M. R. Co. v. Berry, 44 Ark. 17; Cairo & F. R. Co. v. Parks, 32 Ark. 131; Memphis & L. R. Co. v. Berry, 41 Ark. 436.

The constitutional limitations on legislative power of article 9 have no application to public lands which passed into private ownership with the privilege of commuted taxation created with respect to them while they were yet public lands. City of St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469.

Clapp & Macartney, for appellant. (With respect to lands owned by St. Paul & Duluth Railroad Company.)

It has been repeatedly held that a constitutional provision requiring property to be uniformly assessed and taxed, or requiring property to be assessed at its true value, or at its actual value, does not prohibit a legislature from commuting a tax, or from contracting for its release, for a consideration. Cooley, Const. Lim. (4th Ed.) 463. It is a practical and very general course to require corporations to pay an annual per centum in lieu of state taxes, and, in some states, in lieu of all other taxes. Burroughs, Taxn. § 53; Hunsaker v. Wright, 30 Ill. 146; Board of Supr. v. Campbell, 42 Ill. 491; Chicago v. Sheldon, 9 Wall. 50; Kneeland v. Milwaukee, 15 Wis. 454; Dean v. Gleason, 16 Wis. 1; Wisconsin C. R. Co. v. Taylor Co., 52 Wis. 37. Const. art. 9, § 3, is not self-executing. The direction to the legislature to pass such laws can have no force because there is no means of enforcing such direction. The imposition of a duty upon the legislature cannot be construed as a limitation upon its powers, because the power of the legislature is plenary, and can only be restrained by plain limitations. Curryer v. Merrill, 25 Minn. 1; Ames v. Lake Superior & M. R. Co., 21 Minn. 241, 281. The amendment of 1871 was not only a ratification of the acts subsequent to the adoption of the state constitution, but was a construction by the people in adopting the amendment of such acts, and a recognition of their validity. The only constitutional objection to the legislature entering into a contract with the company for a commuted system of taxation was sections 1 and 3 of article 9, and this went not to the general power to make a contract but to provide a commuted system of taxation; and, if

that was validated, the entire contract was validated, not only upon principle, but upon the rule of law that a ratification of a contract made by an agent, without authority, is a ratification of the whole contract. *Strasser v. Conklin*, 54 Wis. 102. The land in question was never the subject of or affected by any prohibition contained in the state constitution. The lands never became—and there was no possibility by which they could become—a part of the public domain for taxable purposes, except by the terms of a contract. Since the contract in question contained the provision relative to taxation, the lands were not, until they passed beyond the range of that contract, within the purview of article 9. *People v. Auditor-General*, 7 Mich. 84. See *First Div. St. P. & P. R. Co. v. Parcher*, 14 Minn. 224 (297); *State v. Winona & St. P. R. Co.*, 21 Minn. 315; *State v. Winona & St. P. R. Co.*, 21 Minn. 472.

M. D. Grover, for appellant. (With respect to lands owned by Great Northern Railway Company.)

A. Y. Merrill and *H. W. Childs*, Attorney General, for respondent.

The form of submission of Laws 1895, c. 168, was sufficient. *Worman v. Hagan*, 78 Md. 152, 164; *Nesbit v. People*, 19 Colo. 441. The court will take judicial notice of the adoption and ratification of the law. *Division of Howard County*, 15 Kan. 194, 213. Under the constitution the law became effective eo instanti upon its adoption and ratification. No fault, whether of commission or omission, on the part of the election officers could change or affect the result. *Prohibitory Amendment Cases*, 24 Kan. 700, 714; *Seneca M. Co. v. Osmun*, 82 Mich. 573. Granting that the state canvassing board did not strictly comply with the law in any respect, the will of the people of the state cannot be thereby defeated. *Prince v. Skillin*, 71 Me. 361; 1 *Greenleaf, Ev.* (Lewis' Ed.) § 6; *New York & M. L. R. Co. v. Winans*, 17 How. 30, 41; *Brown v. Piper*, 91 U. S. 37. It was not in the power of the legislature to enter into a contract with either of the railroads whereby either of them would be relieved of its just proportion of taxation. See *Primm v. City of Belleville*, 59 Ill. 142; *Bright v. McCullough*, 27 Ind. 223; *City of Zanesville v. Richards*, 5 Oh. St. 590; *Exchange Bank v. Hines*, 3 Oh. St. 1; *Lehigh I. Co. v. Lower Macun-*

gie Tp., 81 Pa. St. 482; Northampton v. County Commrs., 145 Mass. 108; Lumsden v. Cross, 10 Wis. 282; Norris v. City of Waco, 57 Tex. 635; People v. Whyler, 41 Cal. 351; Stinson v. Smith, 8 Minn. 326 (366); State v. U. S. & C. Exp. Co., 60 N. H. 244; Tucker v. Ferguson, 22 Wall. 527; Bailey v. Magwire, 22 Wall. 217; Erie Ry. Co. v. Pennsylvania, 21 Wall. 492; Union P. R. Co. v. Philadelphia, 101 U. S. 528; Salt Co. v. East Saginaw, 13 Wall. 373; Welch v. Cook, 97 U. S. 541; New Orleans C. & L. R. Co. v. New Orleans, 143 U. S. 192; Ohio L. I. & T. Co. v. Debolt, 16 How. 416; Providence Bank v. Billings, 4 Pet. 514, 561; Philadelphia & W. R. Co. v. Maryland, 10 How. 376, 393; Jefferson B. Bank v. Skelly, 1 Black, 436, 447; Delaware R. Tax, 18 Wall. 206, 225; Christ Church v. County of Philadelphia, 24 How. 300; New Jersey v. Wilson, 7 Cranch, 164; West Wisconsin R. Co. v. Board of Supr., 93 U. S. 595; Railroad Co. v. Gaines, 97 U. S. 697; Memphis G. L. Co. v. Shelby Co., 109 U. S. 398; First Div. St. P. & P. R. Co. v. Parcher, 14 Minn. 224 (297); State v. Winona & St. P. R. Co., 21 Minn. 315; City of St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469; County of Stevens v. St. Paul, M. & M. Ry. Co., 36 Minn. 467.

START, C. J.

This is an appeal from the judgment of the district court of the county of Aitkin, adjudging that a peremptory writ of mandamus issue, directing the appellant, as county auditor, to place three certain parcels of land upon the tax list of the county for the year 1897.

The first tract is the property of the St. Paul & Duluth Railroad Company, the second is owned by the Northern Pacific Railroad Company, and the last belongs to the Great Northern Railway Company. Each of the railway companies acquired its land by grants from the state or United States made after the adoption of our constitution, and all statutes affecting the question of their taxation were enacted subsequently to that event. No part of the lands here in question are in any manner connected with, or used in the operation of, the railways of the respective companies; and they do not, and will not when sold, increase the aggregate of the gross earnings of the companies, upon which they pay a tax.

The trial court held, in effect, that these lands are now taxable, by virtue of the provisions of Laws 1895, c. 168, relating to the taxation of certain lands owned by railroad companies. The appellant claimed that this chapter was never enacted by the legislature, nor submitted to, and adopted and ratified by, the electors of the state; but that, if it was, it is void, because it impairs the contract between the state and the railroad companies as to taxation of their lands and other property.

1. The first objection made to this statute is to the effect that in the state senate it did not receive the necessary vote of a majority of the members elected to that body, because the Honorable Frank A. Day, who voted for the bill and whose vote was necessary to pass it, was not then a senator, and his vote thereon was void. Assuming that the question whether this statute ever passed the senate depends upon the legality of Mr. Day's vote, we hold that his vote was not a nullity, and that the bill was properly passed.

The undisputed facts as to this question are that Mr. Day was duly elected as a senator from the Sixth senatorial district of this state for the term of four years, commencing January, 1895. He qualified, entered upon the duties of the office, and on January 25, 1895, became president pro tempore of the senate. Six days thereafter, Governor Nelson resigned, and Lieutenant Governor Clough became governor; and thereafter, until the close of the Twenty-Ninth session of the senate, Mr. Day performed the duties of, and acted as, lieutenant governor. He also, until the close of the session, continued to act and vote as senator, with the tacit approval, at least, of the senate. Upon the opening of each day's session of the senate, and upon every call of the house, and upon all votes taken upon any bill or resolution, his name was regularly called as one of the senators.

The conclusion which the appellant claims from these facts is that Mr. Day ipso facto became lieutenant governor when Governor Clough became governor, and that thereafter he was not, and could not, under the constitution, be a senator, either de jure or de facto. This conclusion is based upon the proposition that whenever the lieutenant governor becomes governor during a vacancy in

that office for any cause, and the president pro tempore becomes lieutenant governor by reason of a vacancy in the latter office, his office as senator becomes absolutely vacant.

The provisions of the constitution which have a bearing directly or indirectly on this question are these:

(a) The powers of government shall be divided into three distinct departments, legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers belonging to either of the others, "except in the instances expressly provided in this constitution." The legislature of the state shall consist of the senate and house of representatives. The executive department shall consist of a governor, lieutenant governor, etc. The lieutenant governor shall be ex officio president of the senate, and in case a vacancy shall occur, from any cause whatever, in the office of governor, he shall be governor during such vacancy. The compensation of a lieutenant governor shall be double the compensation of a state senator. Before the close of each session of the senate, they shall elect a president pro tempore, who shall be lieutenant governor in case a vacancy shall occur in that office. Const. art. 3, § 1; Id. art. 4, § 1; Id. art. 5, §§ 1, 6.

(b) Each house shall be the judge of the election returns and eligibility of its own members. The house of representatives shall elect its presiding officer. No senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States or the state of Minnesota, except that of postmaster. Every bill, having passed both houses, shall be carefully enrolled, and shall be signed by the presiding officer of each house. Const. art. 4, §§ 3, 5, 9.

(c) The house of representatives shall have the sole power of impeachment. All impeachments shall be tried by the senate; and, when sitting for that purpose, the senators shall be upon oath. All the officers in the executive department (except the lieutenant governor), and the judges of the supreme and district courts, may be impeached and removed from office for corrupt conduct therein. No officer shall exercise the duties of his office after he shall have been impeached, and before his acquittal. On the

trial of an impeachment against the governor, the lieutenant governor shall not act as a member of the court. Const. art. 4, § 14, and Id. art. 13, §§ 1, 3, 4.

The constitution was intended to provide a complete and harmonious scheme of state government, and to provide against the possibility of any interregnum in the office of governor, or interruption in the exercise of the functions and powers of that office. The several provisions of the constitution we have quoted were adopted at the same time, and must be construed together, as a whole, and with reference to the purposes for which the constitution was ordained. It is not permissible to select a single, isolated provision, and give it effect according to its literal reading, without reference to modifications made by the express language of other provisions of the instrument. The contention of the appellant that whenever there is a vacancy in the office of lieutenant governor the president of the senate pro tempore becomes as fully and completely lieutenant governor, for the residue of the term, as if he had been originally elected, and thereupon his office of senator becomes absolutely and permanently vacant as to him, cannot be sustained without disregarding both the letter and spirit of the constitution, when considered as a whole, and without adopting a construction well calculated, when party strife and spirit are intense, to disturb the public peace and order.

If, as claimed, the president pro tempore of the senate becomes lieutenant governor for the residue of the term in case of a vacancy in that office, it necessarily follows that the lieutenant governor, when he becomes governor in case of a vacancy in the latter office for any cause, holds that office for the residue of the term; or, in other words, if a vacancy, from any cause, in the office of governor or lieutenant governor occurs, it is necessarily an absolute and permanent one. This proposition, if correct, would logically tend to support the further claim that, when the president pro tempore once becomes lieutenant governor, his office of senator is absolutely and permanently vacant as to him. On the other hand, if the constitution recognizes both permanent and temporary vacancies in the offices of governor and lieutenant governor, such fact has an important bearing on the question whether the president pro

tempore ceases to be a senator when he becomes a lieutenant governor. This brings us to the consideration of the meaning of the word "vacancy," as used in the constitution in reference to the office of governor and lieutenant governor.

The constitution provides that the lieutenant governor shall be ex officio president of the senate, and in case a vacancy shall occur, from any cause whatever, in the office of governor, he shall be governor during such vacancy; but it does not in express terms declare when, or for what causes, a vacancy shall exist in the office of governor. The language used, however, clearly implies that such vacancy may occur from several causes, and may be either permanent or temporary. This was the construction given to the constitution by the first legislature convened after its adoption, which provided that in case of death, impeachment, resignation or removal of the governor from office, the lieutenant governor shall exercise the office of governor until he be acquitted or another governor shall be duly qualified. Laws 1858, c. 87, § 10. Again, within a few years after the adoption of the constitution and during the Civil War, the lieutenant governor, as governor ad interim, exercised the powers and discharged the duties of the office of governor during the necessary absence of the governor from the state.

The governor may be impeached, but he is forbidden by the constitution to exercise any of the duties of his office after he has been impeached, and before his acquittal. The time between the preferring of articles of impeachment against him by the house of representatives and the close of his trial by the senate may be several months. The office cannot remain vacant during such time, for there can be no suspension of the powers and duties of the office of chief executive. The power and duty to command the military forces of the state, to execute the laws, to suppress riots and insurrections, to fill vacancies in office, and to grant and demand the surrender of fugitives from justice, are of necessity continuous, and the necessity for their exercise may arise at any time. The powers of the office must be exercised during such vacancy by some one, and the constitution provides that the lieutenant governor shall be governor during such vacancy. Necessarily, in case of the impeachment of the governor, such vacancy may be either

permanent or temporary, depending on the verdict of the senate. If it convicts, the vacancy is permanent. If it acquits, it is temporary. If the vacancy in the office of governor occasioned by his impeachment is not to be filled, the state government is without an executive head for months. But if the vacancy is filled by the lieutenant governor, and he thereby becomes governor, "as fully and completely * * * as though he had been legally elected in the first instance to that office," then to prefer articles of impeachment against the governor is to remove him permanently from office, although the senate promptly acquit him. Such a construction of the constitution would be a menace to the peace and order of the state.

If the governor is incapacitated by illness so that he cannot exercise the powers of his office, then, if the proposition contended for by the appellant is correct, either the office must remain vacant during his illness, or be filled by the lieutenant governor for the balance of the term. In such a case there is no escape from the conclusion that either there is to be an interregnum in the office of governor during his illness, which may or may not continue to the end of his term, or that his illness at once permanently removes him from office, although he speedily recovers. A construction of the constitution which would lead to the results suggested by these illustrations must be rejected.

It is clear that the vacancy in the office of governor provided for by the constitution may arise from a variety of causes, such as his death, resignation, impeachment, illness or absence from the state, that it is necessarily permanent or temporary according to the facts of each case, that the lieutenant governor is governor only during such vacancy, and that in case of a temporary vacancy he is governor only for the time being, and, when the temporary vacancy ends, the governor returns to his office, and the lieutenant governor to his. A corollary of this proposition is that the vacancy in the office of lieutenant governor, upon the occurrence of which the president pro tempore of the senate becomes lieutenant governor, is of the same character as the vacancy in the office of governor. The vacancy in the office of lieutenant governor may be permanent or temporary, depending on the character, cause and

duration of the vacancy in the office of governor. Such being the case, the president pro tempore, when he becomes lieutenant governor for the time being during such vacancy, ought not to be held to be no longer a senator, unless the express words of the constitution imperatively require such a construction. There are no such words or provisions in the constitution, and such a construction cannot be given to it, and at the same time give effect to other provisions of that instrument.

All the reasons we have suggested why the office of lieutenant governor does not become absolutely and permanently vacant, as to that officer, as soon as he is called upon to act as governor during a temporary vacancy, apply with greater force to the president pro tempore of the senate; for if the senatorial office of the president pro tempore is rendered absolutely vacant, as to him, by his becoming lieutenant governor, then such a result follows upon the happening of the first vacancy in the office of governor for any cause, or for any duration; and, in case such vacancy is only temporary, then at its termination the governor resumes his office, the lieutenant governor his, and the president pro tempore will be out of office entirely, and the people of his district deprived of the right to be represented in the senate until his successor can be elected. There is no language in the constitution requiring or justifying the conclusion that the senatorial office of the president pro tempore becomes vacant when he becomes lieutenant governor by reason of, and during, a vacancy in the office of governor. On the contrary, there is no escape from the conclusion that the president pro tempore does not cease to be a senator when he becomes lieutenant governor by reason of a vacancy in the governor's office.

This conclusion is further supported by the character of the duties of lieutenant governor and of the president pro tempore. They are identical. Neither of them has any power or duty properly belonging to the executive department. True, the lieutenant governor is declared to be an officer of the executive department, and it is declared that no person belonging to one of the departments shall exercise any of the powers properly belonging to either of the others, except in instances expressly provided for by the

constitution; but the fact remains that this classification is simply one of convenience, and that he is not authorized to exercise a single power or to perform a single duty, as lieutenant governor, properly belonging to the executive department. His sole constitutional duties are to preside over the senate (he is not a member thereof and has no vote, even in cases where the senators are evenly divided), and to authenticate by his signature the bills passed by the senate. These duties and powers belong strictly and properly to the legislative department. They are the precise duties imposed by the constitution on the presiding officer of the house of representatives, and there is just as much reason for claiming that the speaker of the house, when elected, ceases to be a member thereof, as there is to claim that a senator who is president pro tempore ceases to be a senator when he becomes lieutenant governor.

That it was not intended by the constitution to confer executive powers upon the lieutenant governor, as such, is also apparent from the fact that he cannot be impeached, although all the other officers of the executive department may be. A senator, therefore, when he becomes lieutenant governor because he happens to be president pro tempore of the senate, is not called to the discharge of any executive duties. All his new duties properly belong to the legislative department, and there is no reason why his senatorial office should become vacant, but every reason to the contrary. There is just as much warrant in the constitution for claiming that a senator ceases to be such when he is elected president pro tempore as there is to claim that such result follows when he becomes lieutenant governor.

It is suggested that the constitution does not require the senate to elect one of its own members its president pro tempore. Neither does it expressly require that the presiding officer of the house of representatives shall be a member thereof. But from the adoption of the constitution to the present time the presiding officers of the senate and house have always been members of the body over which they were elected to preside. This practical construction of the constitution is the correct one, with the possible qualification that no senator under the age of 25 years can be elected

president pro tempore, for the reason that both the governor and lieutenant governor must be at least 25 years of age.

The prohibition of the constitution that no senator or representative shall, during the time for which he is elected, hold any office except that of postmaster, is relied upon by counsel for appellant in support of the proposition that when Mr. Day became lieutenant governor he ceased to be senator. They state, in one of the briefs, the argument thus: "That the two offices of lieutenant governor and senator are incompatible is made explicit by this provision. The result must follow that, Mr. Day having become lieutenant governor, he ceased to be senator."

If the premises of counsel are correct, they are fatal to their conclusion, for Mr. Day was a senator before he was either president pro tempore or lieutenant governor. He was a *de jure* senator, constitutionally elected for the term of four years, during which time he was prohibited from holding any other office under the authority of the state, even if he resigned the office of senator. The result must follow from a literal reading of the section, that, being ineligible to any other office, he continued to be a *de jure* senator. It is obvious that this section of the constitution does not, explicitly or otherwise, make the offices of lieutenant governor and senator incompatible, or a senator ineligible to the office of lieutenant governor during the term for which he was elected; for it is otherwise expressly provided by the constitution, that a senator who is president pro tempore shall become lieutenant governor in case of a vacancy. Indeed, this particular section has but little relevancy to the question under consideration, except to emphasize the necessity of construing the several provisions of the constitution as a harmonious whole, and not each section by itself.

There remains one other provision of the constitution to be considered in this connection, which is inconsistent with the appellant's claim. "On the trial of an impeachment against the governor, the lieutenant governor shall not act as a member of the court." Art. 13, § 4. This is an express recognition of the fact that a senator may be a lieutenant governor; for the court for the trial of impeachments is the senate, and it is composed exclusively of senators, who shall be upon oath. If in such cases the lieuten-

ant governor was not also a senator, he could not take the oath as senator and act as a member of the court; but the constitution provides for cases where the lieutenant governor is also a senator and would, except for this express prohibition, be entitled to act as a member of the court, as senator. This prohibition would be wholly unnecessary, except upon the assumption that a senator did not vacate his office on becoming lieutenant governor. Our conclusion is that Mr. Day did not cease to be senator when he became lieutenant governor.

2. Was the law (Laws 1895, c. 168) submitted to the electors in compliance with the constitution and the statute? We answer the question in the affirmative. Const. art. 4, § 32a, adopted in 1871, provides as follows:

“Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this state, or operating its road therein, or which may be hereafter organized, shall in lieu of all other taxes and assessments upon their real estate, roads, rolling stock and other personal property, at and during the time and periods therein specified, pay into the treasury of this state a certain percentage therein mentioned of the gross earnings of such railroad companies now existing or hereafter organized, shall, before the same shall take effect and be in force, be submitted to a vote of the people of the state, and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them.”

The form of the submission of the act in question to the electors, as printed on the ballots, was this:

For taxation of railroad lands.	Yes.	
	No.	

The appellant claims that: “The form of ballot adopted was a cunning political device to catch votes; an evasion of the constitution, which requires that the law itself shall be submitted to the voters,”—hence it was never submitted to the vote of the people. The question here is not whether the form of the ballot selected by the legislature is the best and fairest that could have been framed by a trained lawyer. But it is, did the form of ballot actually used comply with the constitution?

Neither the form nor the manner of submitting the question of the amendment to the people is prescribed by the constitution. They are left to the judgment and discretion of the legislature, subject only to the implied limitation that they must not be so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote. It cannot be claimed, in reason or justice, that this case falls within this limitation. The form was prescribed by the act itself, which was a public statute, so far as it was in the power of the legislature to make it such. It was published with the Laws of 1895, and fully advised the electors, not only as to the provisions of the act, but also how they were to express their decision upon the question of ratifying the act. The constitution requires that all amendments to that instrument shall be submitted to the people for their approval or rejection. Art. 14, § 1. There is no essential difference between this requirement and the one as to the submission of the law in question. Therefore, if it was necessary to print the law upon the ballot or to refer to it by its title, then the same particularity would be required in submitting constitutional amendments. Such, however, has not been the legislative or practical construction of the constitution, for there are a large number of important amendments to the constitution which were submitted by a ballot upon which there was no suggestion as to the nature of the amendment. It has never been suggested that such amendments are void. The act in question was properly submitted to the people.

3. The act under consideration is further assailed on the ground that it was not ratified by the popular vote.

The law was submitted to the people at the general election of 1896, and there were cast and counted for it 235,585 votes, and 29,530 votes against it; but, by virtue of the constitution, it was not adopted and ratified, unless a majority of all the electors who voted at the election voted for it. A majority in favor of it of all the votes cast upon the proposition is not sufficient. It is conceded that the vote on the proposition was as we have stated. It is then mathematically true that the law was adopted by a majority of all the electors, unless there were cast at the general election of 1896 at least 471,170 ballots. Courts will take judicial notice of

whatever is generally known within the limits of their jurisdiction. 1 Greenleaf, Ev. § 6; Lanfear v. Mestier, 89 Am. Dec. 663, notes. Now every intelligent man in the state knows, from the census and election returns and the general and political history of the state, that there were not cast at the last general election 471,170 votes.

We do not, however, rest our conclusion that this law received a majority of all the votes cast at the election upon this ground, but we rest it upon the broad ground that the existence of a public law is a fact of which courts will take judicial notice without pleading or proof. Judicial notice does not depend upon the actual knowledge of the judges. When the fact is alleged, they must investigate, and may refresh their recollections by resorting to any means which they may deem safe and proper. *Brown v. Piper*, 91 U. S. 37, 42; *Gardner v. The Collector*, 6 Wall. 499. Courts, however, do not take judicial notice of votes and elections, except so far as they affect the validity of some public law. The rule is stated by Judge Brewer in these words:

"The courts are to know what is and what is not a public law of the state, what is and what is not a part of the constitution, and, to that end, must take judicial notice of everything, near or remote, that determines such fact. This argument condensed, is this: The courts take judicial notice of what is public law, statutory or constitutional. When a majority of the electors voting on an amendment, at an election properly ordered, adopts it, then it becomes a part of the constitution. So the constitution itself says. The courts must judicially know whether such amendment has been adopted, and is in fact a part of the constitution, and to that end, if need be, must take judicial notice of every ballot cast at that election." *Prohibitory Amendment Cases*, 24 Kan. 700, 715.

The rule is stated in *State v. Cooley*, 56 Minn. 540, 554, 58 N. W. 154, thus: Courts will "take judicial notice of all facts bearing on the constitutionality of the law."

The validity of this law depends upon whether it received a majority of all the votes cast at the election, not on the subsequent act or omission of the state canvassing board, or of any other officers. For the purpose of determining this fact, the court will take judicial notice of the election records, returns and canvass

thereof by the state board in the office of the secretary of state, and, if necessary, of the election returns and canvass in the offices of the several county auditors of the state. We have found it necessary to refer only to the election returns and records in the office of the secretary of state, and have there found appropriate, clear and satisfactory information upon the question whether the act was adopted and ratified by a majority of the electors voting at the election, and are able to, and do, answer the question in the affirmative.

The election returns in the office of secretary of state on December 22, 1896, when the votes were canvassed by the state board, showed that the total number of ballots cast at the last general election was 343,319; but no returns as to the total number of ballots cast had then been received from seven counties, and the board made no declaration to the effect that the law had been adopted. Their certificate gave only the vote for and against the proposition. Shortly after the canvass, and before the trial of this action in the district court, a return certified by the county auditor was received from each of the seven counties, giving in the aggregate the total number of ballots cast at the election in his county. These returns show that the total ballots cast in the seven counties were 17,979, which, added to the 343,319 previously returned from the other counties, give 361,298 as the total number of ballots cast at the election. As no elector was authorized to cast more than one state ballot, it follows that 361,298 electors voted at the election, and no more. It was therefore necessary that 180,650 votes should be cast for the law, in order to adopt it. It received 235,585 votes, or 54,935 more than were legally necessary.

4. This brings us to the last contention of the appellant. It is, in effect, that the several statutes of the state providing for the payment by the several railway companies of a gross-earnings tax in lieu of taxation of their property in specie are irrevocable contracts between the state and the companies, the obligations of which Laws 1895, c. 168, impairs.

It must be conceded, in obedience to the decisions of the supreme court of the United States, that a state may by its legislature, in the absence of constitutional inhibitions, irrevocably limit

or contract away its right of taxation. It is, however, as decisively settled by the same court that the taxing power of the state will not be held to have been surrendered or limited unless such surrender is expressed in terms too clear to admit of a doubt. It must be expressed in clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation by the state of the unimpaired power of taxation; for it is a sovereign power, absolutely essential to the continued existence of the state.

It is not necessary here to set out the terms of the several statutes under which it is claimed that the lands of the railway companies are exempt from taxation in the usual manner of taxing real estate. They, in effect, provide for a commuted system of taxing railroad property, by permitting the railway companies to pay annually to the state a specified percentage on their gross earnings, in full of all other taxes and assessments on their property. The St. Paul & Duluth Railroad Company and the Northern Pacific Railroad Company accepted the provisions of these statutes. The Great Northern Railway Company never has. Under the canon of construction applicable to statutes which are claimed irrevocably to limit or absolutely to relinquish the power of taxation by the state, it is not clear that the statutes here in question can be construed as irrevocable contracts; for the language used is not so specific as to preclude all argument, inference or presumption against the claim of the appellant. The statutes do not contain any express stipulations that the percentage shall not be increased or diminished, or that the system of taxation shall not be changed to meet changed conditions in the future. What might have been a fair and equal gross-earnings tax when these statutes were enacted might be grossly unequal under changed conditions, such as an increase in the value of the land grants of the companies, or the necessity for an increase in the rate of taxation for state, county, school and local purposes.

But it is not our purpose to decide the question here suggested; for we place our decision, that the statutes under which the railroad companies claim do not constitute irrevocable contracts between them and the state that their lands shall never be taxed as other land is taxed by the state, upon the broad ground that when the statutes were enacted they were unconstitutional. Such stat-

ules were in violation of article 9, §§ 1, 3, of the constitution, the material provisions of which are:

"Section 1. All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state."

"Sec. 3. Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money."

Section 3 also expressly exempts certain property from taxation.

If it be conceded that a commuted system of taxation, whereby a percentage on gross earnings is accepted in lieu of taxation of railway property in specie, might be so adjusted as not to be obnoxious to the constitutional requirement of uniformity and equality of taxation, it is clear that an irrevocable contract, fixing for all future time the rate of taxation on such gross earnings, would not continue to be uniform and equal taxation, because the value of property changes from time to time and the necessities of the state also change, demanding an increased rate of taxation. This is especially true as to town, village, city and county taxes. But uniformity and equality of taxation are not the only mandates of the constitution; for it further commands that all property on which taxes are to be levied (that is, all property not exempt from taxation) shall have a cash valuation, and that laws shall be passed taxing all real and personal property according to its true value in money. The language of the constitution is clear, exact and imperative. It requires that all property not exempt must be taxed, and that the basis of such taxation must be the cash value of the property. As was said by this court in the case of *Board of Commissioners of Rice County v. Citizens' National Bank*, 23 Minn. 280, 287.

"The leading and controlling purpose of these provisions was to subject all property, of every kind and nature, within the jurisdiction of the state, except such as is specially authorized to be exempted, to taxation upon a basis of a cash valuation, and to secure, so far as practicable, absolute equality and uniformity in the appor-

tionment of taxes, so that every piece of property should bear its just and proportionate share of the public burden in the exact ratio of its cash value to that of the entire taxable property of the state."

It may be true, as claimed, that a gross-earnings tax, if subject to amendment, is only another mode of arriving at equal taxation, and that such a system of commuted taxation of the property of railway companies and similar corporations is of great practical and material advantage to the state; but the fact remains that the taxation of all property upon the basis of its cash value was the sole rule ordained by the constitution to secure equality and uniformity of taxation. Thus, in *Stinson v. Smith*, 8 Minn. 326 (366), which arose before the amendment to the constitution as to assessments for local improvements, it was held that a statute providing for the assessment of the cost of such improvement upon real estate in proportion to benefits was unconstitutional, because all property on which taxes are to be levied must have a cash valuation. A commuted system of taxation of mining lands, property and products by the payment of a tonnage tax on all ore mined and disposed of, in lieu of all other taxes, was held invalid by this court, because in conflict with article 9, § 1, of the constitution. *State v. Lakeside Land Co.*, 71 Minn. 283, 73 N. W. 970.

There is no decision of this court which holds that statutes of the state providing for the payment of a gross-earnings tax by railway companies, and exempting their property from taxation in specie upon the basis of a cash valuation, were constitutional prior to their ratification by the amendment of 1871, art. 4, § 32a. There is a clear intimation to the contrary in several cases,—notably in those which follow the *Parcher* case, 14 Minn. 224 (297), sustaining the validity of territorial statutes providing for a gross-earnings tax for the old land-grant railway companies; that is, those which are organized under charters granted prior to the adoption of the constitution.

It is further claimed on behalf of the appellant that the mandates and inhibitions of the constitution as to the taxation of all private property have no application to public lands which passed into private ownership with the privilege of commuted taxation created

with respect to them while they were yet public lands. If this proposition is true, then the legislature, if there are no other constitutional provisions prohibiting it, may provide for exempting from taxation the school lands of the state after their sale, and after they have become absolutely private property, or provide that the owners thereof may forever pay a percentage on the gross or net income derived therefrom, in lieu of all other taxes. The mandate of the constitution applies to all property which is the subject of private ownership, without reference to the source of its acquisition. It would be a palpable evasion of the constitution to permit the legislature to absolutely transfer public lands to private owners, vested with privileges and immunities as to taxation which are prohibited by the constitution.

We hold that the statutes under which it is claimed that the lands in question are exempt from taxation in the ordinary way, upon the basis of their cash valuation, were unconstitutional when enacted, and remained so until validated by the constitutional amendment of 1871. The legal effect of such amendment was to validate them. *State v. Luther*, 56 Minn. 156, 57 N. W. 464. But this ratification or validation of the statutes was a qualified one, and the right to repeal or amend them was reserved by necessary implication, provided such repeal or amendment was adopted and ratified by a majority of the electors.

Our conclusion is that Laws 1895, c. 168, does not impair the obligation of any contract between the state and railway companies, and that the lands here in question are taxable in the ordinary way, as other lands are taxable.

Judgment affirmed.

ADAM REITER v. WINONA & ST PETER RAILROAD COMPANY.

May 12, 1898.

Nos. 10,703—(44).

73	225
73	86
73	87
72	225
180	241
72	225
88	888

Master and Servant—Injury to Servant—Dangerous Premises—Assumption of Risk—Complaint—Demurrer—Swanson v. G. N. Ry. Co., 68 Minn. 184, Followed.

Under the rule, recently stated in *Swanson v. Great Northern Ry. Co.*, 68 Minn. 184, that servants, while performing their duties, are bound to take notice of the operation of familiar natural laws, and to govern themselves accordingly, it is *held* that the complaint herein failed to state a cause of action.

Appeal by defendant from an order of the district court for Brown county, Webber, J., overruling a demurrer to the complaint. Reversed.

Brown & Abbott, for appellant.

Jos. A. Eckstein, for respondent.

COLLINS, J.¹

From the complaint herein, it appears that plaintiff was a common laborer in defendant's employ, engaged with others in the loading of flat cars with a steam shovel at a gravel pit, all work being done under the direction of a foreman having full and complete charge; that it became necessary to move the shovel nearer to the gravel, whereupon the foreman ordered plaintiff to go behind it, and between it and the embankment, "which was almost a perpendicular bank of soil and gravel, about twenty feet in height," there to assist in laying a new track upon which to run the shovel; that, while plaintiff was obeying these orders, the embankment caved, and the soil and gravel fell upon plaintiff, causing the injuries upon which he bases the right of action. There are other allegations not here material, as we view the case, which comes before us on an appeal from an order overruling a general demurrer to the complaint.

It is nowhere alleged that the embankment, almost perpendicu-

¹ BUCK, J., absent, took no part.

lar, and 20 feet high, caved in by reason of any other than natural causes,—the operation of the laws of gravitation. Assuming, as we must, that the plaintiff was a person of ordinary intelligence, he well knew and understood the operation of these natural laws, and therefore should have anticipated the result. The danger constantly attending him when at work was to be apprehended, and he assumed the risk. No distinction can be made between the complaint now before us and that considered in *Swanson v. Great Northern Ry. Co.*, 68 Minn. 184, 70 N. W. 978, in which we held that a general demurrer to the complaint was well taken under the rules already laid down in this court. See the cases there cited. The demurrer should have been sustained.

Order reversed.

STATE OF MINNESOTA ex rel. CITY OF ST. PAUL v. DISTRICT COURT
OF RAMSEY COUNTY and Another.

May 12, 1898.

Nos. 10,994—(29).

**Municipal Corporation — Officer de jure and de facto — Usurping
Functions of Office—Void Act.**

Where a person who is not and cannot be an officer de jure, because there is not and cannot be an office de jure to be filled by any one, usurps the functions and performs acts required by law to be done by officers who exist at the time, de jure as well as de facto, such law has not been complied with, and the acts cannot be held valid.

**City of St. Paul—Commissioner of Public Works—Laws 1895, c. 228
—Assessment for Local Improvement.**

In accordance with the provisions of Laws 1895, c. 228, held unconstitutional in *State v. Copeland*, 66 Minn. 315, a person was appointed "commissioner of public works" for the city of St. Paul, who entered upon the duties and pretended to perform the acts of the board of public works until ousted in the above-entitled action. *Held*, that the acts of the so-called "commissioner" in reference to a local improvement were invalid, and did not authorize an assessment for such improvement.

Certiorari to review a judgment of the district court for Ramsey county, vacating an assessment for local improvements in the city

of St. Paul and denying the application of the city treasurer for judgment thereon, entered in pursuance of the decision and order of Bunn, J. Writ discharged.

James E. Markham and Hermon W. Phillips, for relator.

Counsel cited *Plymouth v. Painter*, 17 Conn. 585; *State v. Carroll*, 38 Conn. 449; *Burt v. Winona & St. P. R. Co.*, 31 Minn. 472; *Secombe v. Kittelson*, 29 Minn. 555; *Fraser v. Freelon*, 53 Cal. 644; *State v. Rich*, 20 Mo. 393; *Tucker v. Aiken*, 7 N. H. 113; *Hooper v. Goodwin*, 48 Me. 79; *Hamlin v. Kassafer*, 15 Ore. 456; *McCraw v. Williams*, 33 Gratt. 510; *Petersilea v. Stone*, 119 Mass. 465; *People v. Staton*, 73 N. C. 546.

S. L. Pierce and R. A. Walsh, for respondent.

COLLINS, J.

The question now presented is whether a certain assessment for local improvements in the city of St. Paul is valid when the acts in reference to such improvements, required by the city charter to be done and performed by the board of public works, have not been done or performed by such board, but, instead thereof, by a person claiming to hold the office of commissioner of public works, an office attempted to be created by Laws 1895, c. 228, a statute held to be unconstitutional in *State v. Copeland*, 66 Minn. 315, 69 N. W. 27, in which case a writ of ouster was ordered against the person in question to remove him from the alleged office.

It stands conceded that, from the time of his appointment to the so-called "office," the incumbent was recognized by the authorities of the city and exercised the functions and performed the acts and duties which had by the charter been cast upon the board of public works, a board consisting of four persons, and had practically usurped their places in all matters which had previously come before the board as provided by law. The board resisted this usurpation, and met daily for the purpose of transacting the business which under the charter was theirs to perform. This condition of affairs continued until the writ of ouster deprived the alleged officer of all semblance of right, and, as a result, the board resumed its official labors without interference.

We thus have the case of a person who could not, under any circumstances, become a *de jure* officer (because there was not and could not be a *de jure* office to be filled by any one), who has assumed to act officially in reference to an assessment for local improvements and to perform certain duties which had been conferred by law upon a board of public works,—a board which existed *de jure* as well as *de facto* at the same time. And it is these acts of actual usurpation which are relied upon to sustain the validity of an assessment which may result in a divestiture and transfer of real property in the exercise of an authority which must be clearly given to a municipality, and always strictly pursued.

There are many cases in the books in which the acts of *de facto* officers have been considered, and in many instances recognized as valid. But none have been cited which go further in the direction of sustaining the contention of counsel for the city as to the validity and sufficiency of the acts of the so-called “commissioner” than that of *Burt v. Winona & St. P. R. Co.*, 31 Minn. 472, 18 N. W. 285, 289, in which this court held by a majority opinion that where a court or office has been established by a legislative act apparently valid, and the court has gone into operation, or the office has been filled and exercised under the act, it is a *de facto* court or office. The act there considered had created a municipal court,—a thing the legislature had power to do; but, upon its passage in the senate, the act failed to receive the constitutional number of votes,—a fact established by evidence aliunde. And the decision was guardedly placed upon the particular facts in hand. We do not here either approve or disapprove the *Burt* case; but in no event can it be extended in its application.

The legislative act under which the right to appoint a commissioner of public works was exercised, and under which the appointee served in the stead of rightful officers, was in itself unconstitutional, and was as inoperative as if it had never been passed. The cases which bear upon the question now before us were carefully reviewed in *State v. Carroll*, 38 Conn. 449, and again, recently, in *Flaucher v. City of Camden*, 56 N. J. L. 244, 28 Atl. 82; but not one can be found which is authority for the claim here made, that, where a person who is not and cannot be an officer *de*

jure (because there is not and cannot be an office de jure to be filled by any one), has intruded and usurped the functions and performed the acts required by law to be done by officers who exist at the time, de jure as well as de facto, such law has been complied with, or the unauthorized acts held valid. The agency through which the city should have acted when making the improvement—the board of public works—was disregarded and ignored, and hence the assessment was properly set aside.

Writ discharged.

COMMONWEALTH TITLE INSURANCE AND TRUST COMPANY v.
ENGEBRET K. DOKKO.

72	229
77	441

May 12, 1898.

Nos. 10,997—(150).

**Ejectment—Usury in Mortgage as Defense under General Denial—
Evidence.**

In an action of ejectment where the complaint is in the usual form, merely averring ownership in fee in the plaintiff of the premises described, and that he is entitled to the possession, and that the defendant unlawfully withholds the same, evidence of usury in the consideration of a mortgage by virtue of which the plaintiff claimed title is admissible as a defense under the general issue.

Appeal by defendant from an order of the district court for Norman county, Ives, J., denying a motion for a new trial. Reversed.
Mosness & Combs, for appellant.

A. C. Wilkinson, for respondent.

BUCK, J.

This is an action in ejectment to recover the possession of 160 acres of land in Norman county. The plaintiff is a corporation organized under the laws of the state of Pennsylvania, and claims a title in fee simple to the premises in dispute, obtained through a mortgage dated April 16, 1889, executed by the defendant, Dokko, and wife to the Northwestern Guaranty Loan Company of Minneapolis, and by it assigned to plaintiff November 27, 1891, which

mortgage was duly foreclosed, and the premises bid in by the plaintiff at such foreclosure sale. Plaintiff demands judgment for the possession of the premises, and damages for the withholding thereof. Answer, a general denial, except in admission of possession and claim of ownership of the land.

There is no dispute as to the regularity of the foreclosure proceedings, and that plaintiff purchased the premises at the foreclosure sale for the amount due with costs. When the parties rested, the court directed a verdict in favor of the plaintiff, as follows: That plaintiff is the owner of and entitled to the premises described in the complaint, and to have judgment for \$35 rental value for withholding said premises, and \$5 cost of serving papers. From an order denying the defendant's motion for a new trial, the defendant appeals.

The complaint merely alleges that the plaintiff is the owner of the land in controversy, but does not disclose the manner in which such title was obtained, and hence the defendant properly put the plaintiff's title in issue by the general denial in his answer. On the trial the defendant attempts to prove that the mortgage on which the plaintiff relied for its title to the premises in question was void because tainted with usury. The plaintiff objected upon the ground that usury could not be given in evidence under a general denial, but ought to have been specially pleaded, and that defendant is estopped by his failure to defend against the foreclosure proceedings at the time when they were pending. The court sustained the objection. In this we think the court erred.

In actions of ejectment at common law the defendant could plead nothing but the general issue of not guilty and the statute of limitations. Tyler, Ej. 464, 467. But, as a general rule, this plea put in issue every material allegation of the complaint, and cast the burden of sustaining each by completed proof on the plaintiff. Newell, Ej. 247. And it is the general rule that under the general issue the defendant in ejectment may offer evidence of any matter tending to defeat the plaintiff's action. 7 Enc. Pl. & Prac. 340, and numerous cases there cited. There may be exceptions to this rule, but the case at bar is not one of them. In Pomeroy's Code Remedies (section 679) the rule is thus stated:

"In an action to recover possession of land, if the complaint is in the usual form, merely averring that the plaintiff is owner in fee of the premises described and entitled to their possession, and that the defendant unlawfully withholds the same, the general denial admits proofs of anything that tends to defeat the title which the plaintiff attempts to establish on the trial."

In *Holton v. Button*, 4 Conn. 437, it was held that in an action of ejectment evidence of usury in the consideration of a mortgage by virtue of which the plaintiff claimed title was admissible as a defense under the general issue. This case was similar to the one under consideration. In *Hills v. Eliot*, 12 Mass. 26, it was held that in a real action a purchaser may avoid a prior conveyance from his grantor by giving usury in evidence under the general issue. See, also, *Kipp v. Bullard*, 30 Minn. 84, 14 N. W. 364; *Sparrow v. Rhoades*, 76 Cal. 208, 18 Pac. 245; *Lain v. Shepardson*, 23 Wis. 224-228; *Lombard v. Cowham*, 34 Wis. 486. This rule seems reasonable, because the defendant, not being apprised of the source of title upon which the plaintiff relies, might, by setting up a specific ground of defense in his answer, be taken by surprise by the plaintiff's evidence revealing an entirely different ground for his cause of action than that supposed by the defendant, and against which his answer was interposed. As was said by this court in *Kipp v. Bullard*, *supra*, at page 85:

"The defendant in such case is not bound to anticipate what the plaintiff will rely upon to establish his allegation of title, but, when plaintiff's proofs are in, may disprove, or show that for any cause the plaintiff did not, by means of the facts so proved, acquire the title."

Now, while upon the face of the papers, the title may have appeared to pass to the plaintiff, yet, if the defendant's contention is true, that the consideration in the mortgage was tainted with usury, the defendant should have been permitted to prove it, as such an illegal consideration would have rendered it invalid, and the foreclosure proceeding valueless. Even though the assignment of the mortgage was bona fide, it was not entitled to the protection applicable to negotiable paper, and passed into the hands of the plaintiff subject to all equities existing at that time against

the mortgagee. See *Watkins v. Goessler*, 65 Minn. 118, 67 N. W. 796, where the decisions of this court upon the subject are cited.

Of course, the fact that the plaintiff made the foreclosure, and bid in the premises in its own name, does not give it any better position, or give it any more legal or equitable rights, than it had before. It is not claimed that any money was paid for the premises at such foreclosure sale, but they were retained on the plaintiff's bid as assignee of the mortgage. If plaintiff paid a consideration, it did so before the foreclosure, and not thereafter. It therefore had no greater equity arising by reason of the purchase at the foreclosure sale than in the original purchase of the mortgage itself.

Order reversed.

CHARLES J. BERRYHILL v. ALEXANDER M. PEABODY and Others.

May 12, 1898.

Nos. 11,028—(50).

Estate of Decedent—Contingent Claim—Statute of Limitations—G. S. 1894, § 4514.

A contingent claim, arising on contract, against the estate of a decedent, which does not become absolute and capable of liquidation before the time limited for creditors to present their claims to the probate court for allowance, is not barred by that part of G. S. 1894, § 4514, which provides that "no claim against a decedent shall be a charge against or lien upon his estate unless presented to the probate court as herein provided within five years after the death of such decedent."

Contingent Joint Obligation—Action in District Court against Representative of Deceased Obligor—G. S. 1894, § 4521.

G. S. 1894, § 4521, which provides that, when two or more persons are indebted on any joint contract, and either of them die, his estate is liable therefor, is applicable to an action brought in district court against the legal representatives of such estate, to recover an amount alleged to be due on a contingent joint obligation for the payment of money, not absolute and capable of liquidation when the time expires for the presentation of claims to the probate court.

Action in the district court for Ramsey county by plaintiff, as substituted assignee of the estate of Henry M. Bristol and another,

insolvents, against Alexander M. Peabody, the original assignee, and Charles E. Clarke and others, as executors of the will of Henry Hale, deceased. The amended complaint alleged, among other things, that the insolvents made a general assignment of their property on August 29, 1885, to defendant Peabody, who accepted such trust and filed his bond with said Hale and one Austrian, as sureties, in the sum of \$32,050; that Peabody reduced the assets into money, and on May 8, 1888, distributed among the creditors, under the order of the court, \$6,370.98, leaving in his possession \$3,394.61; that on or about January 1, 1892, Peabody converted the \$3,394.61 to his own use; that December 7, 1890, Hale died testate; that in January, 1891, his will was allowed by the probate court for Ramsey county; that the time for filing claims against his estate expired six months after February 13, 1891; that said estate has not been settled; that Austrian died March 18, 1891, and that Peabody was insolvent and had made an assignment for the benefit of his creditors.

From an order, Bunn, J., overruling a demurrer to this complaint, the executors of the will of Henry Hale appealed. Affirmed.

Clapp & Macartney, for appellants.

Alva R. Hunt and Charles J. Berryhill, for respondent.

CANTY, J.¹

Counsel for appellants take the position—First, that the cause of action set forth in the complaint is barred by the limitation prescribed in G. S. 1894, § 4514; and, second, that, in any event, the obligation sued upon is a joint bond, and, under the common-law rule, the estate which they represent cannot be held.

1. It clearly appears that the claim in litigation is a contingent one, which did not become absolute or capable of liquidation prior to the expiration of the time within which creditors were required to present their claims to the probate court for allowance. And it also appears that the testator, Hale, died more than five years before the commencement of this action. Counsel's contention is based upon that clause of the section before mentioned which provides that

¹ BUCK, J., did not sit.

"No claim against a decedent shall be a charge against or lien upon his estate unless presented to the probate court as herein provided within five years after the death of such decedent."

In *Hantzch v. Massolt*, 61 Minn. 361, 63 N. W. 1069, it was held that contingent claims, arising on contract, which do not become absolute and capable of liquidation before the expiration of the time limited for creditors to present their claims to the probate court for allowance, are not barred under the provisions of section 4511; in other words, that the only contingent claims covered by this section are such as have become certain and absolute before the time fixed by the court for the presentation of claims has expired. Other contingent claims—those which have not become absolute and capable of liquidation within the time—are not affected by this section.

Now, there is nothing in the language used in section 4514 which indicates that claims other than those which can be presented for allowance in the regular course of administration are to be governed by it, or are to be barred thereby. On the contrary, express reference is made to claims which can be thus presented and allowed, for a part of the provision is, "unless presented to the probate court as herein provided"; that is, as provided elsewhere in the Code. A contingent claim which is not absolute, and for that reason cannot be allowed by the probate court within the time prescribed, is not one to be presented to that court at any time. In fact, the contingent claim may not become absolute until more than five years after the decease. Such a claim, under the construction insisted upon by counsel, would be barred before it accrued. Obviously, the five-year limitation was designed to cover the claims provable under section 4511, and not those depending upon a contingency, and for that reason not provable at all. It was not intended to govern where the claims in question could not be presented or allowed as provided in the Probate Code because of their contingent character, when the probate court was required to act.

2. It is also contended by counsel for appellant executors that the obligation sued upon is joint, and not joint and several, and for this reason the demurrer should have been sustained. We are of

the opinion that it is immaterial whether the bond is the joint or the joint and several obligation of those who signed it. G. S. 1894, § 4521, provides:

“When two or more persons are indebted on any joint contract, or upon a judgment founded on a joint contract, and either of them die, his estate is liable therefor, and the amount thereof may be allowed by the probate court, as if the contract had been joint and several, or as if the judgment had been against him alone.”

In respect to the application of this statute to the present case, counsel for appellants make the point that it has no relevancy in actions brought in the district court, but simply relates to the practice in the probate court, making that the only tribunal in which the statute is applicable. The ground for this contention is that the section in question is found in the Probate Code, not elsewhere. But we must be governed by the plain reading of the statute, that the estate of the joint debtor who has deceased shall be liable for such indebtedness, and it cannot be material that it appears in the Probate Code alone. Its purpose was to abrogate the common law, by which, at the death of one of two or more joint makers of an obligation, all remedy at law against his estate was extinguished. No action at law could then be maintained against his personal representatives, jointly or severally.

Except as to the provision that the amount due may be allowed by the probate court, this section is a transcript of a statute found in the probate codes of several other states, in which it was construed years ago as affording a clear and adequate remedy at law against the estate of deceased debtors where none existed before. *Curtis v. Mansfield*, 11 Cush. 152; *Burgoyne v. Ohio L. Ins. & T. Co.*, 5 Oh. St. 586. See, also, *U. S. v. Spiel*, 8 Fed. 143. The words added to the original statute do not indicate a legislative purpose to deprive the creditor of his full remedy, or to confine him to proof of his claim in the probate court under section 4511. If this was the purpose, the creditor holding a contingent claim not made definite and provable under the last-mentioned section would have no right or remedy under section 4521. The statute is remedial, and must be liberally construed.

Order affirmed.

ANNA TAMKE v. ANFIN J. VANGSNES.

May 12, 1898.

Nos. 11,043—(151).

Breach of Promise of Marriage—Evidence of Promise—Charge to Jury.

On the trial of an action for breach of promise to marry, in which an issue was made by the evidence as to the making of the promise, a witness testified that defendant had told him that he was soon to marry plaintiff. The court instructed the jury that, if there was an actual promise of marriage, plaintiff was entitled to recover, and then charged: "But, on the other hand, if you find that there was no promise of marriage, and that defendant did not, by his acts or by his speech, hold out to the plaintiff or to others with whom he talked that he was to marry her, then you will find for the defendant." *Held* to be prejudicial error.

Same—Compensatory Damages—Financial Condition and Position of Defendant.

In such a case the jury have the right, when assessing compensatory damages, and should be so instructed, to consider the financial condition of the defendant and his social position, and what rights and privileges the plaintiff would have acquired pecuniarily and socially, if defendant had performed his contract.

Same—Exemplary Damages—Pleading.

Whether, in order to warrant the recovery of exemplary damages, in an action of this nature, it is necessary to allege in the complaint the special facts or circumstances relied upon, is undecided.

Same—Exemplary Damages—Motives and Intentions of Defendant—Instructions.

In a charge respecting the assessment of punitive or exemplary damages in such a case the question of defendant's motives and intentions, whether good or bad, when entering into the engagement or when breaking it off, should be so submitted that no doubt could exist in the minds of the jury as to the law upon the subject. And the jury should also be instructed that punitive or exemplary damages may be awarded in case improper motives exist on defendant's part, when making the engagement, if the jurors, in the exercise of a sound discretion, believe the plaintiff entitled thereto.

Appeal by defendant from an order of the district court for Nor-

man county, Ives, J., denying a motion for a new trial after a verdict in favor of plaintiff for \$4,000. Reversed.

W. W. Calkins and *H. Steenerson*, for appellant.

To justify an award of punitive damages the complaint must allege facts to support such award. *Andrews v. Stone*, 10 Minn. 52 (72); *Carli v. Union Depot S. R. & T. Co.*, 32 Minn. 101; *Craig v. Cook*, 28 Minn. 232; *Gregory v. Coleman*, 3 Tex. Civ. App. 166; *Johnson v. Chicago, R. I. & P. R. Co.*, 51 Iowa, 25; *Savannah, F. & W. Ry. Co. v. Holland*, 82 Ga. 257; *Sherman v. Kilpatrick*, 58 Mich. 310.

Mosness & Combs, for respondent.

Punitive damages may be allowed without any allegation claiming them in the complaint. *Coryell v. Colbaugh*, 1 N. J. L. 77; *Davis v. Slagle*, 27 Mo. 600; *Fidler v. McKinley*, 21 Ill. 308; *White v. Thomas*, 12 Oh. St. 312; *Hale, Dam. § 225*; 3 *Sedgwick, Dam. (8th Ed.) § 1263*; 1 *Sutherland, Dam. § 422*; *Williams v. Williams*, 20 Colo. 51; *Davis v. Seeley*, 91 Iowa, 583; *Bennett v. Bean*, 42 Mich. 346; *Reed v. Clark*, 47 Cal. 194; *Royal v. Smith*, 40 Iowa, 615; *Grant v. Willey*, 101 Mass. 356.

COLLINS, J.¹

Action for breach of promise, in which plaintiff had a verdict, well supported on the merits of the evidence. Defendant appeals from an order denying his motion for a new trial. Error in the admission of certain testimony and in the charge of the court in several particulars is assigned. It is also alleged that the verdict was excessive in amount, the result of passion and prejudice.

1. The court below committed reversible error when charging the jury, for which a new trial must be had. The plaintiff alleged and testified to an absolute promise of marriage on defendant's part as well as on her part. The defendant denied in his answer, and when testifying, that he had ever promised plaintiff that he would marry her, or that there ever had been an absolute engagement between them. One witness testified that defendant had told him upon a certain occasion that he was soon to marry the plaintiff. With

¹ BUCK, J., took no part.

this state of the evidence, the jury was instructed that plaintiff was entitled to a verdict if there was an actual promise of marriage at a certain time. The court then proceeded as follows:

"But, on the other hand, if you find that there was no promise of marriage, and that defendant did not, by his acts or by his speech, hold out to the plaintiff *or to others* with whom he talked that he was to marry her, then you will find for the defendant."

And to this part of the charge an exception was duly taken. The vice in this language is because the jury might understand from it that, if defendant held out to others that he was to marry plaintiff, a verdict against him would be warranted, without any promise on his part to plaintiff or any actual engagement between them. The plaintiff was, of course, bound to establish a contract of marriage made by her with defendant, and yet the words italicized, "*or to others*," ignored and excluded this most essential element of a mutual engagement to marry. It was equivalent to charging that, if defendant told or held out to other persons that he was to marry plaintiff, his promise was established, and she could recover compensation, the promise not having been performed. We are not able to hold that this part—when taking into consideration the whole charge—was not misleading and harmful.

2. The defendant admitted that during the time he was paying attention to plaintiff, and at the time the latter claimed he was engaged to her, he was engaged to another woman, the one he subsequently married, and made further admissions as to his loverlike treatment of plaintiff while so engaged to another, which reflects rather seriously upon his good faith towards one or both of these women.

This probably led the court of its own motion to charge in substance that, if defendant was engaged to another woman when he became engaged to plaintiff, "he would subject himself thereby to what the law denominates punitive damages." Then followed other language in respect to plaintiff's right to recover damages by way of punishment. From the size of the verdict it is evident that this part of the charge had great weight with, and was acted on by, the jury. With an argument not justified by the ex-

ception, and very much broader in its scope and effect, counsel urges that the charge upon this point ignores the motives and intent of defendant; that by using the word "subject" the jury was deprived of a right which they had, and of which they should have been informed, to allow punitive damages or not at their will, in the exercise of a sound discretion.

It is also urged that under the allegations of the complaint damages of this character could not be awarded, because no facts or circumstances justifying such an award had been pleaded. This pleading was in the ordinary form, setting out the promise, plaintiff's request that defendant fulfill it, his refusal, and that he had wrongfully married another woman. It was silent as to the other engagement, or as to any other specially aggravating facts or circumstances; but that all of the evidence in aggravation, and upon which exemplary damages were based, was admissible under this complaint is admitted, for it all tended to support plaintiff's right to recover compensatory damages.

But four members of the court were present at the argument, and, we regret to say, two are of the opinion that no special circumstances or facts need be pleaded to justify an award of damages by way of punishment, while the other two are of the contrary opinion. This leaves the question of the sufficiency of the complaint upon this question undetermined.

3. With reference to a new trial we feel warranted in saying that parts of the charge in respect to damages purely compensatory, as well as damages by way of punishment, are open to criticism, although they may not be erroneous. Much clearer and better language in respect to what may be considered when estimating damages by way of compensation is found in the third paragraph of the opinion in *Johnson v. Travis*, 33 Minn. 231, 232, 22 N. W. 624, thus:

"You have a right to consider the financial condition of the defendant and his social position, and as to what rights and privileges she would have acquired, pecuniarily and socially, if the defendant had performed his contract."

And in the same case (paragraph 2) the law as to instructions

where damages by way of punishment are claimed is also well stated. The question of defendant's motives and intentions, whether good or bad, when he entered into the engagement, and while it continued (no claim is made that he was justified in breaking it off), should be submitted in a manner which would leave no doubt in the minds of the jurymen upon the law on the subject. And an instruction should also be given that punitive damages may be awarded in case improper motives existed on defendant's part when making the engagement, if the jurors, in the exercise of a sound discretion, believe plaintiff entitled thereto. No other assignments of error need be mentioned.

Order reversed.

72	240
d88	460

CITY OF RED WING v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

May 12, 1898.

Nos. 11,052—(90).

Municipal Corporation—Ordinance Requiring Flagman at Railroad Crossing—Validity.

Held, under a general clause in a city charter giving to the members of its council "full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify, correct and repeal all such ordinances, rules and by-laws for the government and good order of the city, for the suppression of vice, as they shall deem expedient; * * * and such ordinances, rules and by-laws are hereby declared to be and have the force of law, and for these purposes shall have authority by ordinance, resolution or by-laws; provided, that they be not repugnant to the constitution and laws of the United States or of this state: (1) To license and regulate," etc.,—followed by a special enumeration of various subjects upon which the council could legislate, that no power was conferred, impliedly or otherwise, to adopt an ordinance requiring a railway company to maintain a flagman at such street crossings as such council might require.

Same—Power not Implied from Grant of Common-Law Powers.

Nor can the power to enact such an ordinance be implied from the fact that the charter granted "the general powers possessed by municipal corporations at common law."

Same—Care of Streets.

Nor can the power be implied from the fact that the charter confers upon the city the care, control, and management of the streets within its limits.

Same—Police Power.

Nor can such an ordinance be adopted or enforced in the lawful exercise of the police power of the city.

Same—Void Ordinance—Ratification by Amendment to Charter.

An amendment to a city charter which provides that all ordinances of such city theretofore made shall remain in force does not validate an ordinance which was void because unauthorized.

Action in the district court for Goodhue county. The complaint alleged, among other things, that April 30, 1886, the city council of plaintiff city adopted an ordinance which included the following provisions, viz.:

Sec. 2. "Whenever so required by resolution of the city council of said city, it shall be the duty of every railroad company whose track crosses any street or road within the city limits to keep and employ a flagman at such particular street or road crossing as the city council may direct, and such flagman shall give the necessary warning of the approach of all locomotives, trains or cars, to avoid danger to persons and property."

Sec. 9. "Any railroad company or corporation that shall refuse or neglect to comply with the provisions of section two of this ordinance shall forfeit and pay to said city the sum of five dollars for each and every day that such default or neglect shall continue; to be recovered in the name of said city before any court of competent jurisdiction."

The complaint further alleged that June 4, 1897, the city council passed a resolution requiring defendant to place, keep and maintain a flagman on its railroad crossing over Jackson street. The action was brought to recover the penalty provided by section 9 of the ordinance, on account of defendant's neglect to comply with the resolution.

At the trial before Crosby, J., and a jury defendant objected to the introduction of any evidence under the complaint for the reason that it did not state facts sufficient to constitute a cause of action, and the court sustained the objection and granted defend-

ant's motion to dismiss the action. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

J. C. McClure, for appellant.

In support of his contention that the council had power to adopt the ordinance, counsel cited: *Kinsley v. Chicago*, 124 Ill. 359; *State v. Williams*, 11 S. C. 288; *State v. Merrill*, 37 Me. 329; *State v. Clark*, 28 N. H. 176; *Hudson v. Geary*, 4 R. I. 485; *State v. Freeman*, 38 N. H. 426; *Morris v. City Council*, 10 Ga. 532; *Railroad Co. v. Richmond*, 96 U. S. 521; *Texton v. Baltimore*, 59 Md. 63; *Hayes v. Michigan*, 111 U. S. 228; *Com. v. Worcester*, 3 Pick. 462; *Com. v. Stodder*, 2 Cush. 562; *Washington v. Mayor*, 1 Swan (Tenn.) 177; *Mayor v. Williams*, 15 N. Y. 502; 2 *Dillon, Mun. Corp.* § 713; *Green v. Eastern Ry. Co.*, 52 Minn. 79.

F. M. Wilson, for respondent.

The general welfare clause in the charter of 1864, subc. 4, § 2, confers no power to enlarge the powers which are conferred by the special grants of power. 1 *Dillon, Mun. Corp.* §§ 315, 316; *Tiedeman, Mun. Corp.* § 146; *Horr & Bemis, Mun. Pol. Ord.* § 27 et seq. The police power of a municipal corporation must depend upon the will of the legislature, and in order that a city may exercise a particular police power, it must be fairly included in the grant of powers by the charter. *Tiedeman, Lim. Pol. Power*, § 212. A municipal corporation, in the absence of express authority, has not the power by ordinance to compel a railroad company to maintain at a street crossing within the corporate limits a watchman, or flagman, for the purpose of giving warning to passers-by of the approach of trains. *Ravenna v. Pennsylvania Co.*, 45 Oh. St. 118; *Green v. Eastern Ry. Co.*, 52 Minn. 79. The power conferred by the general welfare clause is restricted by reference to other provisions of the charter. 1 *Dillon, Mun. Corp.* § 396; *Mount Pleasant v. Breeze*, 11 Iowa, 399; *Cooley, Const. Lim.* (6th Ed.) 231.

By the express provision of the charter of 1864, subc. 4, § 2, an act of the council is required to be done or manifested by ordinance, rule or by-law, and the same is provided by section 5, subc. 4, of the present charter of 1887. *Tiedeman, Mun. Corp.* § 145; *Horr & Bemis, Mun. Pol. Ord.* § 210; *City v. Barnet*, 46 N. J. L. 62;

Springfield v. Knott, 49 Mo. App. 612; State v. Bayonne, 35 N. J. L. 335; Anderson v. O'Conner, 98 Ind. 168; Newman v. Emporia, 32 Kan. 466; Hunt v. Lambertville, 45 N. J. L. 279; City v. Sears, 2 Colo. 588; Starr v. Burlington, 45 Iowa, 87; Burmeister v. Howard, 1 Wash. T. 207; State v. Mayor, 35 N. J. L. 205; State v. Town, 33 N. J. L. 72; 1 Dillon, Mun. Corp. § 307 and note; City v. Fougeu, 30 Mo. App. 551. Where the charter commits the decision of a matter to the council and is silent as to the mode, the decision may be evidenced by a resolution, and need not necessarily be by an ordinance. Atchison Board v. DeKay, 148 U. S. 591, 598. But the charter of appellant requires an ordinance. Charter power to fine will not permit a forfeiture. Tiedeman, Mun. Corp. § 155; Miles v. Chamberlain, 17 Wis. 446; Kirk v. Newill, 1 Term R. 118, 124; Coonley v. Albany, 132 N. Y. 145, 153; Angell & Ames, Corp. § 360; Cooley, Const. Lim. (6th Ed.) 248; State v. Ferguson, 33 N. H. 424; Robinson v. Mayor of Franklin, 34 Am. Dec. 640, and note. The power to punish is confined to the modes and penalties expressly prescribed by the charter and excludes others. Tiedeman, Mun. Corp. §§ 154-156; Dillon, Mun. Corp, §§ 336, 339-410; 4 Wait, A. & D. 613; Cooley, Const. Lim. (6th Ed.) 232.

COLLINS, J.

Counsel for the appellant city insists that the city council had the power to enact the ordinance under which this action was brought, because (1) such power was expressly conferred in the "general welfare" clause; (2) because of the implied power granted by the charter; (3) because of the police power of the city over the streets; and (4) because the ordinance had been expressly legalized by the legislature.

1. It is admitted that no express authority to adopt an ordinance compelling defendant railway company to station a flagman at street crossings is to be found in the charter in force at this time (Sp. Laws 1864, c. 6); but it is claimed that the power is conferred by a general clause (subc. 4, § 2), by which the city council was given

"Full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify, correct and repeal all such ordinances, rules and by-laws for the government and good order of the city,

for the suppression of vice, as they shall deem expedient; * * * and such ordinances, rules and by-laws are hereby declared to be and have the force of law, and for these purposes shall have authority by ordinance, resolution or by-laws; provided, that they be not repugnant to the Constitution and laws of the United States or of this state: (1) To license and regulate," etc.

Then follows a special enumeration by subdivisions of various subjects upon which the council may legislate, 37 in all, the last three having reference to the subject of fires.

This general clause is not a "general welfare" clause, as counsel for the city seems to assume. It did not confer upon the city power to enact ordinances, rules, and by-laws for the general welfare of the city, but such only as were required for the "government and good order" of the city or for the "suppression of vice" within its limits. The expressions used are much more restricted, for the words "general welfare" are synonymous with "corporate purposes." Many things are essential to the public or general welfare which belong neither to the government nor good order of, nor to the suppression of vice in, a municipality. *Horr & Bemis, Mun. Pol. Ord. § 27.* It is apparent from the wording of section 2, *supra*, that "for these purposes"—that is, for the government and good order of the city, and for the suppression of vice—it was enacted, that the city council "shall have * * * authority" to adopt ordinances, rules, or by-laws upon the subjects there enumerated. The legislative mind was fully directed to the different matters concerning which municipal authority was intended to be given. The exact scope and extent of municipal power and authority is to be found in these specific enumerations, and the general grant is restricted and limited by these enumerations. *City of St. Paul v. Traeger, 25 Minn. 248.*

The general rule of construction applicable to municipal charters is well stated in the case just cited, as follows: The existence of powers of a legislative character must be shown by an express grant, or as incidental and necessary to the proper enjoyment and exercise of such as are expressly conferred. Nothing outside or beyond this can be taken by intendment or implication. The general clause involved in the case of *Green v. Eastern Ry. Co.*, 52

Minn. 79, 53 N. W. 808, found in the charter of the City of Anoka (Sp. Laws 1889, c. 9, subc. 4, § 3), was much broader than the clause now under consideration. In fact, the power of the council to adopt the ordinances there referred to seems to have been conceded. No authority can be found in section 2, *supra*, for the passage of the ordinance on which plaintiff relies.

2. Nor can the authority be implied from the fact that the charter (subc. 1, § 1) granted to the city "the general powers possessed by municipal corporations at common law"; nor from the fact that the care, control, and management of the streets was vested in the city. Special power was conferred upon the council to prohibit immoderate riding or driving upon the streets. It may also be conceded that, by implication, the city had the right to regulate, by ordinance, the rate of speed at which trains should be propelled across streets and to prohibit a dangerous rate at street crossings; but it does not follow that it could require flagmen to be stationed at such places. The reasons for a distinction between an ordinance regulating the rate of speed at a street crossing and one which requires a flagman to be stationed there are stated in *Ravenna v. Pennsylvania Co.*, 45 Oh. St. 118, 12 N. E. 445; and what is said in that case also disposes of the contention of counsel that the passage of the ordinance now before us was a lawful exercise of the police power of the city.

3. There is nothing in the claim that the ordinance has been legalized by Sp. Laws 1887, c. 3, subc. 15, § 1,—an amended charter. A law declaring that

"All ordinances and resolutions heretofore made, adopted or established by the city council of the city of Red Wing, shall remain in force, except as altered, modified or repealed by the city council of said city,"

Merely kept in force valid and binding ordinances. It did not validate an ordinance which was void because unauthorized.

Order affirmed.

ANDREW ELLEGAARD and Others v. HANS O. HAUKAAS.

May 12, 1898.

Nos. 11,073—(186).

Justice Court—Jurisdiction—Silence as to Subsequent Jurisdictional Steps.

Where, in a court of inferior or limited jurisdiction, the record shows that jurisdiction has once attached, silence in respect to subsequent jurisdictional steps is not fatal.

Same—Jurisdiction—Presumption of Regularity.

In judicial proceedings before a justice of the peace, the presumption is that he has done his duty, and this presumption exists in favor of the regularity of his proceedings where he has jurisdiction, as in courts of record.

Appeal by plaintiffs from a judgment of the district court for Polk county, in favor of defendant, and reversing a judgment of a justice of the peace in favor of plaintiffs, entered in pursuance to the order of C. L. Brown, J. Reversed.

H. Steenerson, for appellants.

William Watts, for respondent.

BUCK, J.

This action was commenced on February 25, 1897, before T. M. Nelson, justice of the peace of the town of Godfrey, Polk county. The summons was returnable at ten o'clock in the forenoon of March 5, 1897, at which time the plaintiffs and the defendant appeared, and filed, respectively, their complaint and answer. By consent the case was adjourned to March 12, 1897, at which time both parties appeared; and the plaintiffs sought to file their reply, but to this the defendant objected, which objection was overruled by the justice, and the reply filed. The defendant having filed an affidavit for change of venue, the justice transferred the cause to P. Hunter, a justice of the peace residing in the same election district, and by the same order required the parties to appear before said Hunter on March 17, 1897, at one o'clock in the afternoon. Plaintiffs appeared at the time so fixed, but the defendant did not ap-

pear. The entry on the justice's docket is as follows: "Defendant not appearing, judgment rendered for plaintiff, on pleadings, for thirty dollars and eighty-five cents, and for \$10.70, costs of this suit."

Upon appeal to the district court by the defendant, the judgment was reversed, on the sole ground that it appeared from the return of Justice Hunter that he entered judgment at one o'clock on March 17, 1897, instead of waiting until two o'clock p. m. of said day.

We think that the trial court placed an erroneous construction upon the return of the justice. The hearing was fixed for one o'clock, March 17, 1897, and the plaintiffs then appeared, and the justice certifies that certain proceedings were then had, such as plaintiffs giving security for costs and filing their reply; and, the defendant not appearing, judgment was rendered for the plaintiffs. When? It does not appear affirmatively that the justice did not wait one hour for the defendant to appear. The presumption is that the justice did his duty, and waited the required time before entering judgment; and the same presumption exists in favor of the regularity of his proceedings, where he has jurisdiction, as in courts of record. *Smith v. Victorin*, 54 Minn. 338, 56 N. W. 47; *Vaule v. Miller*, 64 Minn. 485, 67 N. W. 540.

The general rule gathered from numerous authorities is this: That where, in a court of inferior or limited jurisdiction, the record shows that jurisdiction has once attached, silence in respect to subsequent jurisdictional steps is not fatal. *Van Vleet*, Coll. Attack, c. 17. Hence in this case, whether it is fairly inferable from the justice's return that he waited one hour for the appearance of the defendant before he entered judgment, or whether the record is to be deemed as silent upon this point, is quite immaterial, for the presumption of duty done by the justice is paramount to any omission in the record as to whether he waited until two o'clock p. m. before entering judgment in favor of the plaintiffs.

Judgment reversed, and case remanded, and the district court is directed to award judgment affirming the judgment of the justice.

OLE O. GALDE v. GEORGE W. FORSYTH.

May 12, 1898.

Nos. 11,110—(189).

Execution—Levy on Mortgaged Chattels—G. S. 1894, § 5458—Levy on Part.

From the findings it appeared that, when levying an execution on the right and interest of the debtor in certain mortgaged goods and chattels (G. S. 1894, § 5458), the officer did not seize all of the property covered by the mortgage. *Held*, in the absence of any finding which indicates that the mortgagee's interests were jeopardized or his rights invaded by a failure to seize all of the mortgaged property, that the levy upon a part thereof was valid and effectual.

Chattel Mortgage—Insecurity Clause—Levy on Mortgagor's Interest—Removal of Mortgaged Property by Officer.

Just cause, based upon the actual existence of facts constituting a reasonable ground for a mortgagee of goods and chattels to believe himself insecure, does not exist when the bare fact is that an officer making a levy on the mortgagor's right and interest in such property has removed it from the town in which it was when mortgaged to another town, the county seat.

Action of claim and delivery of personal property in the district court for Watonwan county. The case was tried before Severance, J., whose findings embraced the following facts: One Horton, on May 25, 1896, executed to plaintiff a chattel mortgage on the property described in the complaint, together with other property, to secure the payment of \$1,000. The mortgage, which was duly filed, contained a clause authorizing the plaintiff, at any time when he should deem the debt secured to be insecure, to take possession of the property, and to sell and dispose of it at public auction, as provided by law. The mortgage also provided that the mortgagor should remain in peaceable possession, so long as the conditions of the mortgage should be fulfilled. The Warder, Bushnell & Glessner Co. obtained judgment for \$167.55 against Horton, and August 5, 1896, defendant, as sheriff, by virtue of an execution issued thereon, levied upon Horton's interest in the property described in the complaint, which was then in Horton's possession, and removed

it from the town of Long Lake, in which it then was and in which the mortgage was filed, to the town of St. James, in the same county. On August 12, 1896, plaintiff, deeming his debt insecure by reason of defendant's levy, served on Horton notice of foreclosure of the mortgage, and served on defendant an affidavit of his claim to the property, and as mortgagee demanded possession of the defendant, to enable him to foreclose. Upon defendant's refusal to surrender the property plaintiff commenced this action, and caused the property to be replevied and delivered to him. As conclusion of law the court found that plaintiff was entitled to possession of the property described in the complaint. From a judgment in favor of plaintiff defendant appealed. Reversed.

Seager & Lobben, for appellant.

W. S. Hammond, for respondent.

COLLINS, J.

In *Barber v. Amundson*, 52 Minn. 358, 54 N. W. 733, it was held that an officer levying an execution upon a mortgagor's right and interest in mortgaged chattels for the purposes of sale, after default, but before possession had been taken by the mortgagee, has the right of actual custody, and, as against the mortgagee, to detain the same for the time prescribed by law for bringing them to sale on the execution. The only features which distinguish that case from the one before us are that in this no default had occurred, a part only of the mortgaged property was seized by the officer, the mortgage contained what is known as the "insecurity" clause, and the mortgagee claimed his right under this clause to reduce the property to possession for foreclosure purposes, because a levy had been made; and, further, that from the findings it appeared that when levying on the property defendant officer removed it from the town of Long Lake, in which the mortgaged property was and in which the mortgage was filed, to the town of St. James, the county seat.

The first question arises out of the fact that the officer did not levy upon and take into his possession all the mortgaged property. By the execution, he was commanded to satisfy by seizure and sale a judgment for the sum of \$167.55, and the property so seized and levied upon was found to be of the value of \$190. It does not ap-

pear of what the mortgaged property not levied on consisted, nor are we informed of its worth. It might not have been in existence when the levy was made, or it might not have anything more than a nominal value. The case of *Manning v. Monaghan*, 1 Bosw. 459, is relied upon as authority for the proposition that all the mortgaged property must be levied on by the officer. Possibly the case is authority for the claim that an officer cannot sell mortgaged property piecemeal and to different persons, thus scattering it; but it goes no further. An examination of the opinion will satisfy the reader that it does not sustain the contention of counsel. The presumption is that the officer performed his duty and complied with the law when making the levy; and, in the absence of any finding which would indicate that the mortgagee's interests were jeopardized or his rights invaded by the omission to seize all the mortgaged property, we cannot hold that the latter was entitled to recover possession of that which was seized.

On the findings of the court, the insecurity clause in the mortgage was not available to plaintiff, unless the fact that the levy itself, or the other fact that the officer removed the property from the town in which it was seized to the county seat, justified the mortgagee in seeking to enforce the clause by means of this action. If the fact of the levy warranted an enforcement of the insecurity clause, the law (G. S. 1894, § 5458) construed in the *Barber* case, which authorizes a levy upon and sale of the mortgagor's right and interest in the chattels, would be of no practical availability in any case where the mortgage contained such a clause. The officer making the seizure would be powerless. He could not retain possession without the mortgagee's consent, and he could not sell the chattels without such possession. The statute would prove a nullity.

Nor, in a case where nothing appears from the findings but the bare fact that the officer has removed the property from the town in which it was when mortgaged to the county seat, can it be held that the mortgagee may recover possession under the insecurity clause. That fact standing alone is insufficient to justify the mortgagee in acting. It is not "just cause, based upon the actual existence of facts constituting a reasonable ground for" believing

himself insecure,—a condition of things which must exist to warrant a taking by the mortgagee under the provision in question. *Deal v. D. M. Osborne & Co.*, 42 Minn. 102, 105, 43 N. W. 835. The seizure by the officer under the execution expressly recognized the rights of the mortgagee. The levy being made subject thereto, the removal was by an officer and, we are to presume, in strict performance of his duty. There is nothing to show that there was the slightest infringement upon the mortgagee's legal rights or that he was even inconvenienced by such removal. The statute provides in terms that the purchaser at the execution sale shall be entitled to the possession of the mortgaged chattels on complying with the terms and conditions of the mortgage. Evidently the intent is to fully protect the mortgagee.

Judgment reversed, and, on remittitur, judgment in favor of defendant will be entered, unless the trial court grants a new trial upon a proper showing.

START, C. J., dissents.

SECURITY INVESTMENT COMPANY v. WILLIAM H. BUCKLER.

May 12, 1898.

Nos. 11,120—(227).

Real-Estate Tax Judgment—Failure to Date—G. S. 1894, § 1585.

Under G. S. 1894, § 1585, a judgment to enforce the payment of delinquent taxes on real estate which is not dated is invalid.

Action to Test Tax Sale, etc.—Repeal of Limitations of Three Years—G. S. 1878, c. 11, § 85; Laws 1887, cc. 60, 127.

The provisions of G. S. 1878, c. 11, § 85, to the effect that an action in which the validity of a tax sale is called in question must be brought within three years from the date of the sale, were repealed by Laws 1887, cc. 60, 127, at least in so far as they applied to actions to set aside and cancel a tax sale, or to "test the validity of the tax sale and tax judgment," and such action may be brought at any time.

Appeal by defendant from a judgment of the district court for

Ramsey county, in favor of plaintiff, entered in pursuance of the findings and order of Otis, J. Affirmed.

S. A. Anderson and F. W. Zollman, for appellant.

Horton & Denegre, for respondent.

BUCK, J.

The plaintiff is a corporation organized under the laws of this state, and is the owner in fee simple of the property described in the complaint, viz. the south half of lot 15 in block 67 in Dayton & Irvine's addition to St. Paul, in Ramsey county. Proceedings were had in the district court of said county to enforce the payment of delinquent taxes on said real estate for the year 1891, and a judgment in due form, save that the same was not dated, was entered against the said real estate in the real-estate tax judgment book kept by the clerk of said court. Assuming to act pursuant to said alleged judgment, the auditor of said county, after notice, offered said premises for sale at his office in said county on May 1, 1893, according to law, and sold the same to the defendant for the sum of \$42.75, and then and there executed and delivered to the defendant a certificate of sale therefor under his hand and official seal. More than three years elapsed since said sale before this action was commenced. There was no redemption from said tax sale. The trial court held that the so-called "tax judgment" for the taxes of 1891 against real estate, and the tax certificate issued thereunder to the defendant, were null and void.

Upon this appeal only two questions are involved. First. Had the statute of limitations run against the right of the plaintiff to bring this action to test the invalidity of the tax sale? Second. Was the sale invalid by reason of the failure of the clerk to date the judgment?

The explicit and mandatory provisions of the statute control both questions, and leave no doubt as to the law upon the subject. G. S. 1894, § 1585, provides a form to be used for the entry of judgment in cases of proceedings of this kind, and then follows this language:

"Such judgment shall be entered by the clerk in a book to be kept

by him, to be called the 'Real-Estate Tax Judgment Book,' and shall be dated and signed by the clerk."

Whether such a requirement as dating the judgment is a useless one is not for this court to determine. If evil consequences follow our holding the judgment null and void by reason of the failure of the clerk to date the judgment, the responsibility rests elsewhere, and not with this court. The law is mandatory, and not directory; and hence the omission to date the judgment renders it and the proceedings thereunder absolutely invalid. This court so held in *Gilfillan v. Hobart*, 35 Minn. 185, 28 N. W. 222.

The provisions of G. S. 1878, c. 11, § 85 (see G. S. 1894, § 1594), to the effect that an action in which the validity of a tax sale is called in question must be brought within three years from the date of the sale, were repealed by Laws 1887, cc. 60, 127, at least in so far as they applied to actions to set aside and cancel a tax sale, or to "test the validity of the tax sale and tax judgment," and such action may be brought at any time.

Judgment affirmed.

M. BROOKS HENDERSON v. FAYETTE D. KENDRICK.

May 12, 1898.

Nos. 11,135—(200).

Chattel Mortgage on Store Fixtures to Secure Loan and Past-Due Rent—Insolvency of Mortgagor—Valid as to Loan.

On November 20, 1896, F., being insolvent to the knowledge of K., the latter loaned F. \$150, and to secure the payment thereof took from him a chattel mortgage on certain store fixtures, and which mortgage also secured the payment to one S. of \$300 back rent due from F. to S. The assignee of F. brought this action against K. to have the lien of the mortgage removed from the fixtures, and the trial court found as a fact that F., in executing the chattel mortgage, intended to give S. a preference over his other creditors, and adjudged said chattel mortgage invalid. There was no such finding as to K., or that his taking the mortgage was in any respect tainted with fraud as to other creditors of F. Held that, while the mortgage was void as to the \$300 back rent due, as being an attempt on the part of F. to give S. a preference over

other creditors, it was valid as a security for the loan of the \$150 made by K. to F.

Appeal by defendant from a judgment of the district court for Ramsey county in favor of plaintiff, as the assignee of Frederick W. Faber, insolvent, entered pursuant to the findings and order of Bunn, J. Reversed as to defendant, with directions.

Pinch & Dampier, for appellant.

Macdonald & Kane, for respondent.

BUCK, J.

On and prior to November 20, 1896, one Faber was carrying on the drug business in the city of St. Paul in a store rented of one Ann K. Stees, for whom the defendant, Kendrick, was agent. On the above date, and for a long time prior thereto, Faber was insolvent, which fact was known to defendant, who then loaned to Faber \$150, and to secure the same took a chattel mortgage covering the fixtures in said store belonging to Faber, which mortgage also secured the payment of \$300 back rent due from Faber to Stees. It was also agreed at the same time that defendant should not take possession of the property covered by said chattel mortgage, but it might remain in Faber's possession, and that he might continue such business in the same manner as if no chattel mortgage had been given on said fixtures, and that defendant would not file said chattel mortgage, but would keep the same in possession, providing Faber should pay, as it became due, his subsequently accruing rent for such store. This mortgage was not filed until January 16, 1897.

On January 19, 1897, Faber, being insolvent, made a general assignment under the insolvency laws of this state to this plaintiff, who, on or about March 23, 1897, pursuant to an order of the court made in the assignment proceedings, advertised for sale to the highest bidder Faber's stock of goods and merchandise, as well as the fixtures covered by said chattel mortgage, and thereafter the firm of Noyes Bros. & Cutler bid off said property at such sale on April 3, 1897, and the assignee reported such sale to the court, and it confirmed such sale and directed the delivery of said property to said purchasers; but they refused to pay for the same until said chattel mortgage should be declared invalid, or the cloud thereon removed.

Thereupon the said goods were delivered to the purchaser, and paid for, less the said sum of \$450, consideration in said chattel mortgage.

Plaintiff brought this action against the defendant to have the lien of said mortgage removed from said fixtures covered by it, and on the trial the court further found that Faber, in executing said chattel mortgage to defendant, intended to give Ann K. Stees a preference over his other creditors, and executed said chattel mortgage with a view of such preference; and as a conclusion of law held that plaintiff was entitled to judgment declaring said chattel mortgage null and void. The defendant, Kendrick, appeals.

But there is no finding by the trial court that in giving the mortgage Faber intended to give the defendant, Kendrick, any preference over any other creditors of Faber, or that the transaction between the two men was in the slightest degree tainted with fraud as to such other creditors. Faber did not then owe Kendrick. There were no grounds or reasons for giving him a preference. The loan of \$150 would naturally aid, instead of injuring, other creditors. The loan was, therefore, a valid one, and the mortgage good as to this loan of \$150. It is to be observed that the property covered by the chattel mortgage was not Faber's stock in trade, but only the fixtures in the store; and the rule that a chattel mortgage which authorizes the mortgagor to sell and replenish the stock of goods and use the same and the proceeds generally is fraudulent and void as against creditors has no application. It is not found that Faber executed the mortgage with intent to defraud or delay his creditors, or that Kendrick entered into any scheme to evade the provisions of the insolvency law prohibiting preferences or to defraud Faber's creditors. Nor are any facts found implying any of these things, although some of the facts found might be evidence tending to prove them.

Upon the question that the mortgage was not filed it does not appear that any one became the creditor of the mortgagor relying upon any alleged false appearance of responsibility thus created. The period which elapsed between the giving of the chattel mortgage, November 20, 1896, to January 19, 1897, was less than nine weeks, and there is neither finding nor evidence to show that any

person became a creditor of Faber during this time. If any inference from the facts found can be drawn, it would be that no person became his creditor during this period, for when he gave such mortgage, and for a long time prior thereto, he had been unable to pay his debts in the ordinary course of business or at all, and his entire assets did not equal the amount of his debts and liabilities. As against a chattel mortgage valid in its inception, given by an insolvent debtor, no presumption should be indulged that third persons became creditors of such notoriously insolvent mortgagor to the extent of defeating its enforcement.

The findings of fact do not justify the conclusions of law affecting Kendrick's interest. As there is no appeal by Ann K. Stees that part of the judgment affecting her interests and rights is not considered, but as that part of the judgment affecting the right of the defendant is easily ascertained and severable, we hold that the judgment of the trial court, so far as affects the interest and rights of the defendant, should be, and hereby is, reversed, and the cause remanded, and the trial court directed to proceed and modify its conclusions of law and judgment in accordance with this opinion.

JOHN H. O'BRIEN v. CITY OF ST. PAUL.

May 13, 1898.

Nos. 10,974—(120).

Municipal Corporation—Policeman—Ineligibility to Office—Liability of City for Services.

The plaintiff was ineligible to the office of policeman of the defendant city. He was, however, appointed to such office by the mayor, and assigned to duty by the chief of police; but the assembly refused to confirm his appointment. He discharged the duties of the office pending the question of his confirmation for 28 days. *Held*, that there is no legal liability on the part of the city to pay for such services.

Appeal by defendant from an order of the district court for Ramsey county, O. B. Lewis, J., sustaining a demurrer to the answer. Reversed.

James E. Markham and Hermon W. Phillips, for appellant.
C. D. & T. D. O'Brien, for respondent.

START, C. J.

The complaint herein alleges that the plaintiff, at the request and by the authority of the duly-authorized officers of the defendant city and at the request of the city through its duly-authorized officers, performed work, labor and services for the city for 28 days, which services were of the reasonable value of \$65, which sum the city agreed to pay to him therefor. The answer alleges that the plaintiff was over 35 years of age on June 1, 1897, and on June 3 thereafter the mayor of the city sent a message to the assembly of the city to the effect that he had appointed the plaintiff to the police force with the rank of patrolman, and that the plaintiff was assigned to duty as such by the chief of police, and performed the services of patrolman under such assignment for 28 days, commencing June 3; that such services are the same services for which a recovery is sought in this action; that the plaintiff's nomination was by the assembly referred to its committee on police, and upon its report, and on July 1, the assembly duly refused to advise or consent to plaintiff's appointment. The trial court sustained the plaintiff's demurrer to this answer and the defendant appealed from its order.

The defendant's charter relating to the police department provides that

"The mayor shall appoint the chief of police, the captains, the detectives, the sergeants, and all policemen, patrolmen, and police officers, * * * with the advice and consent of the common council, but no person shall be eligible to the appointment as policeman, patrolman, or other police officer who is not a citizen of the United States, or under the age of thirty-five years." Sp. Laws 1887, c. 48, § 12 (p. 626).

The plaintiff concedes that, to enable him to maintain an action for the recovery of his salary as a policeman, he must show a valid appointment. He does not claim that his appointment was valid, or that he is entitled to the salary as such; but he bases his right of action upon a claimed implied contract, arising from the rendition by him of lawful services upon a lawful request by the city, the benefit of which services the city has had. But the demurrer ad-

mits the facts alleged in the answer to the effect that the services were rendered as a policeman under a void appointment and that neither the mayor nor the chief of police had any authority to request the plaintiff to perform such services or to accept them on behalf of the city because the plaintiff was over 35 years old and therefore not eligible to appointment as policeman. He stands, then, upon the record, in the admitted position of seeking to recover compensation for the discharge of the duties of an office to which he must be presumed to have known he was not eligible, the duties of which he was requested to perform by the unauthorized act of the chief of police of the city. There was no implied promise on the part of the city to pay for services so rendered.

It is immaterial whether the plaintiff labels his action as one on an implied promise to pay for services rendered, or one for the recovery of his salary as policeman, for the essential facts are not changed thereby. No astuteness in framing the complaint can modify the fact that the services for which he seeks to recover compensation are services rendered as policeman, which he was not authorized to render and which no officer of the city was authorized to request or receive on behalf of the city. Therefore no liability can attach on the ground of implied contract. 1 Dillon, Mun. Corp. § 460.

Order reversed.

JESSIE KELLY v. D. C. HOPKINS.

May 13, 1898.

Nos. 10,988—(90).

Order Refusing to Dismiss Appeal from Probate Court not Appealable.

An order of the district court denying a motion to dismiss an appeal is not appealable.

Appeal by Jessie Kelly, widow of Frank C. Kelly, deceased, from an order of the district court for Watonwan county, Severance, J., denying a motion to dismiss an appeal from the probate court of said county. Dismissed.

Charles Cooley and Ashley Coffman, for appellant.

W. S. Hammond, for respondent.

START, C. J.

This is an appeal from an order of the district court denying a motion to dismiss the appeal of the administrator of the estate of Frank C. Kelly, deceased, from an order of the probate court refusing to set aside its previous order making an allowance to the appellant as the widow of the deceased. The respondent moves this court to dismiss the appeal, on the ground that such an order is not appealable. The motion must be granted, for an order of the district court refusing to dismiss an appeal is not appealable. It does not involve the merits of the action or any part thereof. It is not an order which, in effect, determines the case and prevents a judgment from which an appeal may be taken, or a final order affecting a substantial right in a special proceeding. See *McMahon v. Davidson*, 12 Minn. 232 (357); *Gurney v. City of St. Paul*, 36 Minn. 163, 30 N. W. 661; *Exley v. Berryhill*, 36 Minn. 117, 30 N. W. 436; *Minneapolis Trust Co. v. Menage*, 66 Minn. 447, 69 N. W. 224.

Appeal dismissed.

CITY OF RED WING v. OLIVER M. GUPTIL.

May 13, 1898.

Nos. 11,051—(83).

Abatement of Nuisance—Slaughter House—Action by City.

The city of Red Wing is authorized by its charter to maintain an action to compel the owner of any building or place, which is a nuisance affecting the comfort and convenience of the public, to remove or abate the same, although such nuisance is not injurious to the public health.

Appeal by plaintiff from a judgment of the district court for Goodhue county, in favor of defendant, after a trial before Williston, J., and a jury. Reversed.

J. C. McClure, for appellant.

The action is maintainable by the city. *New Orleans v. Lambert*,

14 La. An. 247; Village of Pine City v. Munch, 42 Minn. 342; Township of Hutchison v. Filk, 44 Minn. 536.

F. M. Wilson, for respondent.

A municipal corporation has no control over nuisances within its corporate limits, except such as is conferred upon it by its charter or by general laws. Village of Pine City v. Munch, 42 Minn. 342; Wood, Nuis. (1st Ed.) § 739; Elliott, Roads & S. 486; Tiedeman, Mun. Corp. (3d Ed.) §§ 374, 379; Parker & W., Pub. Health & S. § 36. A slaughter house is not per se a nuisance. Balentine v. Webb, 84 Mich. 38. The charter confers no power upon the city council to declare what acts or omissions constitute a nuisance. St. Paul v. Gilfillan, 36 Minn. 298. The passage of the resolutions declaring the place of business of the respondent a nuisance and directing its abatement was wholly unauthorized. Yates v. Milwaukee, 10 Wall. 497; People v. Board of Health, 140 N. Y. 1, 9; Clark v. Mayor, 13 Barb. 32; Tiedeman, Mun. Corp. § 226; Tiedeman, Lim. Pol. Power, § 122a; 1 Dillon, Mun. Corp. § 374; Parker & W., Pub. Health & S. § 61; 2 Beach, Pub. Corp. §§ 991-1033; Myers, Vested Rights, 280, 321; Cooley, Const. Lim. (6th Ed.) 741; 2 Wood, Nuis. (3d Ed.) § 744; 4 Wait, A. & D. 619; Milne v. Davidson, 16 Am. Dec. 194, and note. The right of a municipal corporation to license occupations must be plainly conferred or it will not be held to exist. 1 Dillon, Mun. Corp. §§ 361, 325, note 2; Tiedeman, Mun. Corp. § 124, and note 1; 4 Wait, A. & D. 624. The power to regulate does not confer authority to license. Burlington v. Bumgardner, 42 Iowa, 673. Power to license certain occupations inhibits the licensing of other occupations not enumerated. City v. Bross, 101 Ill. 479; Holder v. Galena, 19 Ill. App. 409. Permission or consent on the part of the city to defendant to operate his slaughter house may be inferred from long acquiescence without objection. Babbage v. Powers, 130 N. Y. 281; Gridley v. Bloomington, 68 Ill. 47; Jennings v. Van Schaick, 108 N. Y. 530; Chicago v. Robbins, 2 Black, 418; Jorgensen v. Squires, 144 N. Y. 280; Korte v. St. Paul T. Co., 54 Minn. 530. To be of legal cognizance, the injury must be tangible, or the discomforts perceptible to the senses of ordinary people, and not dependent upon taste or imagina-

tion. *Price v. Oakfield*, 87 Wis. 536; *Stadler v. Grieben*, 61 Wis. 500; *Pennoyer v. Allen*, 56 Wis. 502, 510; *Campbell v. Seaman*, 63 N. Y. 568; *Prentice*, Pol. Power, 209.

START, C. J.

This was an action by the city of Red Wing to enjoin the defendant from operating a slaughter house and rendering establishment within the corporate limits of the city, and to require him to abate the same as a nuisance. Judgment was entered, upon the special verdict of the jury, dismissing the action on the merits, from which the plaintiff appealed.

The special verdict was to the effect that the defendant used and maintained the slaughter house in question without any authority or license from the city of Red Wing, and conducted the business therein in such a manner as to be offensive, disagreeable, and annoying to persons residing in the vicinity of his premises and to persons traveling along the public highway past them by reason of the smells and stench emitted therefrom, but such house and business have not been so conducted as to be injurious to the public health. This is, in its legal effect, the equivalent of a finding that the defendant is maintaining a public nuisance, although it is not injurious to the public health. *Wood*, Nuis. §§ 299, 571; G. S. 1894, § 5881.

A municipal corporation which by its charter is authorized to abate or to compel the abatement of public nuisances may maintain an action in equity to secure such result. *Village of Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197; 6 L. R. A. 763, and notes; *Village of Buffalo v. Harling*, 50 Minn. 551, 52 N. W. 931. The only question in this case is, can the city of Red Wing maintain such an action to compel the abatement of a public nuisance which is not injurious to public health? It cannot do so unless its charter confers upon it authority to remove or abate public nuisances which affect the comfort and convenience of the public, but not the public health. But if it has such power under its charter, it may maintain this action. The nuisance in question is offensive, disagreeable, and annoying to persons living or traveling along the highway in the vicinity of the defendant's slaughter house, by reason of the

smells and stench it emits. It therefore affects the comfort and convenience of the public. The charter of the plaintiff (Sp. Laws 1887, c. 3, subc. 4), among other things, provides:

"Sec. 5. The city council shall have full power and authority to make, ordain, adopt, establish, publish, enforce, alter, amend or repeal all such ordinances, rules and by-laws for the government and good order of the city, * * * for the prevention of crime as they shall deem expedient, and in and by the same to declare and impose penalties and punishments by fine, imprisonment, or both, * * * and for these purposes the said city council shall have authority by such ordinances by law or resolution."

Subsec. 5. "To compel the owner or occupant of any cellar, tallow chandler shop, soap factory, tannery, barn, stable, privy, sewer or other unwholesome, nauseous house or place, to cleanse, remove or abate the same from time to time as often as may be necessary for the health, comfort and convenience of the inhabitants of said city."

Subsec. 31. "To remove and abate any nuisance injurious to the public health, and to provide for the punishment of all persons who shall cause or maintain such nuisance."

Subsec. 32. "To remove or abate any nuisance, obstruction or encroachment upon the streets, alleys, public grounds or highways of the city."

Sec. 12. "The powers conferred upon the city council to provide for the abatement or removal of nuisances shall not bar or hinder suits, prosecutions or proceedings under any general law of this state."

It is obvious from the reading of these provisions that a distinction is made in nuisances, and that the city is not authorized to deal with all alike. Those which jeopardize the public health or obstruct the public streets and grounds, the city itself may proceed summarily to remove or abate, as provided in subsections 31 and 32. This power is conferred upon the city because of the character and consequences of such nuisances. The cases are extreme, and will brook no delay. When the public health is imperiled or public travel is obstructed by the existence of a nuisance, the city may act promptly, and not wait for the slow process of securing its abatement by enforcing the penalties of an ordinance. But as to nuisances which affect the comfort or convenience of the public, but not the public health, the city is only authorized to compel the owners of the buildings or places which constitute the nuisances

to remove or abate them as provided by subsection 5 of its charter. There is no occasion for immediate action in such cases. The literal reading of this subsection 5 would indicate that the city could not compel the owner of such a building or place to cleanse, remove, or abate the same unless it affected the public health as well as the comfort and convenience of the public, the words of the statute being "health, comfort, and convenience." But, clearly, such is not the intention of the statute, and the word "and" should be read "or," in accordance with the rule that "or" may be read for "and" in a statute, and conversely, as the clear intent of the statute may require. *Weston v. Loyhed*, 30 Minn. 221, 14 N. W. 892; *Sutherland*, St. Const. § 252.

It follows from our construction of its charter that the city of Red Wing has the power to compel the abatement of a nuisance affecting the comfort or convenience of the public, although it is not injurious to the public health, and therefore it may maintain an equitable action to aid in compelling an abatement of such a nuisance. It also follows that the trial court erred in entering judgment upon the special verdict for the defendant dismissing the action.

Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

JAMES PETERSON and Another v. LAKE TETONKA PARK COMPANY.

May 13, 1898.

Nos. 11,150—(95).

Garnishment—Failure of Garnishee to Answer—Affidavit of No Debt — Appearance by Attorney — Service of Summons — Return of Sheriff.

The garnishee in this case appeared by its attorney on the return day of the summons, and offered to file an ex parte affidavit denying in general terms its liability, but did not offer to appear and answer in any other manner. *Held*, that judgment was properly entered against it for failure to make disclosure as required by the statute.

Appeal by Minneapolis & St. Louis Railroad Company, garnishee, from a judgment of the district court for Le Sueur county, in favor of plaintiff and against the garnishee, for \$427.62, entered in pursuance of the order of Cadwell, J. Affirmed.

Albert E. Clarke and Wilbur F. Booth, for appellant.

P. J. Kirwin, for respondents.

START, C. J.

The plaintiffs had judgment against the defendant by default, and upon motion, based upon the judgment against the principal defendant and the garnishee proceedings herein, the trial court ordered judgment against the garnishee, which was entered, and from which it appealed.

1. The appellant claims that there was no valid judgment against the defendant, because there was no proof of the service of the summons. The return of the sheriff shows that he served the summons on the defendant, naming it, by handing to and leaving with George Andrews, the president of said Lake Tetonka Park Company, a corporation, a true and correct copy thereof. It is claimed that proof should have been made that the person with whom the copy was left was in fact an officer of the corporation upon whom service might legally be made. The sheriff's certificate was prima facie evidence of the fact, and the proof of service legally sufficient. A similar objection is made to the proof of service of the garnishee summons on the garnishee, and a further objection that it does not appear that the fees and mileage of the garnishee were paid to the same person to whom the copy of the summons was delivered. The proof of the service was sufficient, and whether the right person received the fees is of no importance, as the garnishee appeared without objection.

2. On the return day of the garnishee summons, the garnishee appeared by its attorney, and offered to file as its disclosure the affidavit of its assistant treasurer stating in general terms that it had no money or effects in its hands or under its control belonging to the defendant and that it was not indebted to the defendant in any sum whatever at the time the garnishee summons was served. Objections were made by the plaintiffs to the affidavit being re-

ceived, on the ground that the garnishee was bound to appear by some officer or agent having knowledge of the facts and answer under oath such questions as might be put to him touching any money, property, or effects in the hands of the garnishee belonging to the defendant, or indebtedness to it. The objections were sustained. The clerk before whom the summons was returnable held the proceedings open for two hours, and then certified them to the court, stating in his report, in effect, that the garnishee made no appearance, answer, or disclosure other than we have stated.

The trial court, on motion of the plaintiffs and notice to the garnishee, ordered judgment against it for the amount of the judgment against the defendant on the ground that the affidavit was not a sufficient answer by the garnishee. Thereupon, and before the entry of the judgment, the garnishee moved the court to direct the clerk to correct and amend his report. This motion was made upon affidavits tending to show that the attorney of the garnishee who appeared for it was fully informed as to the state of the account between the defendant and garnishee, and was authorized to make disclosure for it, and that he did offer to be sworn and to answer and make disclosure for it. The affidavits in opposition to the motion tended to show that no such offer was made by the attorney, and that the report of the clerk was correct in all particulars. The motion was denied, and judgment was entered pursuant to the order of the court.

As the motion to have the report amended was denied on conflicting evidence, the order of the court therein must be affirmed. This leaves the question whether the affidavit which the garnishee offered to file as its disclosure was a sufficient answer. Our statute does not provide for any pleading on the part of the garnishee, which is the case in some states. He is required to appear before the judge or other officer, and answer upon oath touching his indebtedness to the defendant, and any property, money, or effects of the defendant in his possession or control. G. S. 1894, §§ 5308, 5317. If the garnishee be a corporation, it must appear by some officer or agent having knowledge in the premises, to answer, and be examined for it. G. S. 1894, § 5311. The plaintiff is given the right to examine the garnishee touching such indebtedness, prop-

erty, money, or effects, so as to elicit all the facts, so that the court, not he, may decide as to his liability. To permit the garnishee to file a general denial in the form of an ex parte affidavit would defeat this right, and constitute the garnishee exclusively the judge of the law as well as the facts. The affidavit was properly disregarded by the court, and the garnishee treated as in default in failing to answer as the statute requires.

Judgment affirmed.

HEMAN H. PALMER v. BANK OF ZUMBROTA and Others.

May 19, 1898.

Nos. 10,961—(65).

Bank—G. S. 1878, c. 33—Powers of Bank of Issue.

1. Banks organized under G. S. 1878, c. 33, had, before the passage of Laws 1895, c. 145, the charter powers of banks of issue, whether they issued any circulating notes or not.

Laws 1885, c. 155—Constitution—Title of Act—Amendment of Articles of Incorporation.

2. In so far as Laws 1885, c. 155, attempts to give authority to amend articles of incorporation in other respects than by extending the term of the existence of the corporation, it is unconstitutional and void, because no subject except such extension is expressed in the title of the act.

Laws 1881, c. 77—Const. art. 9, § 13—Two-Thirds Vote of Legislature.

3. Section 13 of article 9 of the constitution requires that a law for the organization of banks of issue shall be passed by a two-thirds vote of the legislature. *Held*, Laws 1881, c. 77, which attempts to amend section 18 of said chapter 33, contravenes this constitutional provision and is void, because it was not passed by such two-thirds vote.

G. S. 1878, c. 33, § 18—Increase of Capital Stock—Amendment of Articles.

4. *Held*, said section 18, as originally enacted, authorized banks organized under said chapter 33 to increase their capital stock by amending the articles of incorporation.

Same—Formalities Required.

5. But, as the statute is silent as to the manner in which the amendment shall be made, the same formalities are required with reference to the execution, filing, and publication of the amendment as are required with reference to the original articles of incorporation.

Same—Failure to Comply with Formalities—Subsequent Creditors—Estoppel of New Stockholders.

6. Where, in amending the articles of incorporation, the requirements as to these formalities were not complied with, but the amendment was voted for by the stockholders, the increased stock was issued, and held by the new stockholders until, the bank being insolvent, an action was commenced to appoint a receiver for it, under G. S. 1894, c. 76, *held*, as to creditors who have become such on the faith of the new stock, the holders of it are estopped to deny its validity.

Same—Creditors Relying on Increase of Stock—Presumption.

7. Creditors are presumed to have trusted the bank on the faith of the increase of the stock from the time that such increase was voted.

Same—Prior Creditors—Estoppel of New Stockholders.

8. But, as against creditors who became such before such vote, the new stockholders are not estopped, unless there is in favor of such creditors some special equity which creates such estoppel. On the facts in this case, *held*, there is no such equity.

Same—Creditors Receiving Stock in Lieu of Claims—Right to Rescind.

9. *Held*, as against such creditors, the holders of the new stock, who received it from the bank in lieu of claims which they formerly held as creditors of the bank, are entitled to rescind and stand as creditors, not stockholders.

Action under G. S. 1894, c. 76—Allowance of Claims—Distribution of Fund among Creditors.

10. The receiver appointed in such an action has no authority to allow or disallow the claims of creditors; and where he allowed some, and paid a dividend thereon, and disallowed others, the court may allow the latter, and order the same dividend to be first paid on them out of the fund derived from the stockholders' double liability, and order the distribution of the balance of that fund to all the creditors pro rata.

Same—Creditor Failing to Intervene—Right to Dividend.

11. Order construed, and *held* to provide that creditors who failed to intervene and exhibit their claims should receive a dividend; *held*, error.

Same—Purchaser of Claims—Consideration—Right to Dividend.

12. Where the purchaser of a number of the claims of creditors owed no fiduciary relation to the bank or its stockholders, and paid a price which was not so inadequate as to shock the conscience, *held*, he is entitled to a dividend on the full face of the claims.

Same—Stockholders' Liability—Interest—G. S. 1894, § 5504.

13. *Held*, the stockholders' double liability is an unliquidated demand; and in an action, under chapter 76, to enforce it, interest should, under G. S. 1894, § 5504, be allowed on the amount of the double liability from the time of filing the decision in the court below, but not before.

Same—New and Old Stockholders—Stockholders as Creditors—Apportionment of Liability.

14. *Held*, the amounts which the new stockholders, standing as creditors, may collect from the old stockholders on their double liability, should be applied, as far as necessary, in payment of the amounts for which such new stockholders are liable, to the creditors who became such on the faith of the increase of the stock. The manner of determining the extent of this liability stated.

Action under G. S. 1894, §§ 5900, 5901, in the district court for Goodhue county. The case was tried upon issues arising between the intervening creditors of defendant bank and its stockholders before Crosby, J., whose findings of fact and conclusions of law are stated in the opinion. From an order denying a motion for a new trial, certain of the intervening creditors appealed. Remanded with directions to modify the conclusions of law and order for judgment.

Smith & Parsons and *Wright & Matchan*, for appellants.

The stockholders had the power to amend the articles of incorporation by unanimous consent so as to provide for an increase of the capital stock, notwithstanding that there existed no provision for amendment in the organic act, and although the articles of association as originally adopted did not provide for such amendment. The charter of a corporation organized under a general law is the general statute brought into specific operation by the substantial compliance with the terms of the statute on the part of those persons organizing themselves into a body corporate by the adoption of articles of association. 1 Thompson, Corp.

§§ 216, 226. The state having granted its permission to corporations organized under this statute to increase their capital stock, the stockholders could use such methods to avail themselves of the privilege as natural persons might use under similar circumstances. *Bailey v. Champlain*, 77 Wis. 453; *Railroad Co. v. Allerton*, 18 Wall. 233; *Barry v. Merchants*, 1 Sandf. Ch. 280; *White Water v. Vallette*, 21 How. 414, 424; *McKiernan v. Lenzen*, 56 Cal. 61; *Thompson v. Lambert*, 44 Iowa, 239; 1 *Beach, Priv. Corp.* § 44; *Bissell v. Michigan*, 22 N. Y. 258. The objection that certain stockholders did not consent cannot be raised by those who did consent. *Heath v. Silverthorn*, 39 Wis. 146; *Handley v. Stutz*, 139 U. S. 417. It was not even necessary that the full amount of the proposed increase should be subscribed. *Farnsworth v. Robbins*, 36 Minn. 369; *Masonic Temple Assn. v. Channell*, 43 Minn. 353. Express power to amend the articles of association is given by Laws 1885, c. 155, and was strictly pursued. The act is constitutional; and, even if unconstitutional, stockholders who have acted thereunder will be estopped to assert the invalidity of the statute. A general law applicable to all corporations which neither grants nor takes away a banking right or privilege is not within the constitutional restriction upon legislative action. In *re Koetting*, 90 Wis. 166.

Even presuming this law is unconstitutional, persons who have held themselves out to the world as stockholders in a corporation and have held and owned shares in it will be estopped from claiming that the law under which they are organized is unconstitutional. 2 *Morawetz, Priv. Corp.* § 759; *Elliott, Corp.* § 36; *Building & Loan Assn. v. Chamberlain*, 4 S. D. 271; *Olson v. State Bank*, 67 Minn. 267; *Wright v. Lee*, 4 S. D. 237; *Freeland v. Pennsylvania*, 94 Pa. St. 504; *McClinch v. Sturgis*, 72 Me. 288; *Estey v. Runnels*, 55 Mich. 130; *Wentz v. Lane* (Pa. St.) 3 Atl. 878; *Smith v. Sheeley*, 12 Wall. 358; *Daniels v. Turney*, 102 U. S. 415, 421; *Central v. Alabama*, 70 Ala. 121; *McDonnell v. Alabama*, 85 Ala. 401. Even presuming that Laws 1881, c. 77, is constitutional, failure to comply therewith is an irregularity and, the authority to increase the stock actually existing in some form, and the increase having been made in good faith on the assumption that the legal right to do so had been acquired, and the stock having been actually issued, delivered, ac-

cepted and paid for, the stockholder will be estopped to deny his liability to the corporation or its creditors, when he has acquiesced in the irregular or illegal acts. *Elliott, Corp.* § 36; *Minnesota G. L. E. Co. v. Denslow*, 46 Minn. 171; 2 *Morawetz, Priv. Corp.* § 624.

It is said that the existence of three things will make a corporation de facto: (1) Capacity to become a corporation; (2) a good-faith attempt to form a corporation; and (3) user of the right. *Taylor, Priv. Corp.* § 145; *Evanson v. Ellingson*, 67 Wis. 634; *Martin v. Deetz*, 102 Cal. 55. And when these conditions exist there is a corporation de facto, even though there has been an utter failure to comply with the requirements of the law under which there has been an attempt to organize. *Spring Valley v. San Francisco*, 22 Cal. 434, 440; *Bakersfield v. Chester*, 55 Cal. 98; *Foster v. Moulton*, 35 Minn. 458; *State v. Steele*, 37 Minn. 428. Stockholders who have acted and held themselves out to the world as such, and permitted their stock to be considered as an actual component part of the capital stock, are estopped as against creditors of the corporation to set up irregularities in the creation of their stock. *Upton v. Hansbrough*, 3 Biss. 417; *Gaff v. Flesher*, 33 Oh. St. 107; *Hickling v. Wilson*, 104 Ill. 54; *Chubb v. Upton*, 95 U. S. 665; *Upton v. Jackson*, 1 Flipp. 413; *Payson v. Stoeve*, 2 Dill. 427; *Payson v. Withers*, 5 Biss. 269; *Corwith v. Culver*, 69 Ill. 502; *Wheelock v. Kost*, 77 Ill. 296; *McCarthy v. Lavasche*, 89 Ill. 270; *Hager v. Cleveland*, 36 Md. 476; *Hammond v. Straus*, 53 Md. 15; *Eaton v. Aspinwall*, 19 N. Y. 119; *Abbott v. Aspinwall*, 26 Barb. 202; *McHose v. Wheeler*, 45 Pa. St. 32; *Slocum v. Providence*, 10 R. I. 112; *Farnsworth v. Robbins*, 36 Minn. 369; *Pullman v. Upton*, 96 U. S. 328. Such objections are available only on the part of the state in a direct proceeding against the corporation. *Elliott, Corp.* § 36; *Casey v. Galli*, 94 U. S. 673, 680; *Building & L. Assn. v. Chamberlain*, *supra*; *Stofflet v. Strome*, 101 Mich. 197; *St. Paul Land Co. v. Dayton*, 42 Minn. 73; *Columbia Electric Co. v. Dixon*, 46 Minn. 463; *Scheufler v. Grand Lodge*, 45 Minn. 256; *Wright v. Lee*, *supra*.

The fact that the full amount of the increased stock was not subscribed or paid in cash is not available to respondents as a defense in this proceeding. *Masonic Temple Assn. v. Channell*, *supra*; *Farnsworth v. Robbins*, *supra*. Failure to comply with the provis-

ions of this law is an irregularity not available as a defense against creditors. *Delano v. Butler*, 118 U. S. 634; *Aspinwall v. Butler*, 133 U. S. 595; *Pacific Nat. Bank v. Eaton*, 141 U. S. 227; *Thayer v. Butler*, 141 U. S. 234; *Butler v. Eaton*, 141 U. S. 240. Where the abstract power to increase the capital stock of a corporation is granted by the statute under which it is formed, and the increased stock has been held out as a component part of the capital of the corporation, and the creditors have acted or failed to act, believing that the stock had been legally increased, parties who have held the new stock in the hope of receiving dividends have acted as stockholders, voted the stock, or held office in the corporation by virtue thereof, will not be permitted to escape liability as stockholders on the ground that the stock was illegally created. *Veeder v. Mudgett*, 95 N. Y. 295; *Handley v. Stutz*, 139 U. S. 417; *Larede v. Stevenson*, 66 Fed. 633; *Kampmann v. Tarver*, 87 Tex. 491; *Grangers Ins. Co. v. Kamper*, 73 Ala. 325. The true rule of law in this class of cases should be that courts of equity will not aid a stockholder to escape liability to creditors by enforcing the common-law prohibition against corporate action unless the stockholder can show that the reason on which the common-law rule is founded holds good in his individual case. 2 *Morawetz, Priv. Corp.* (2d Ed.) §§ 648, 653, 692.

The court erred in holding that the so-called new stockholders are entitled to stand as creditors to the amounts they have severally paid for the stock, in money or by surrender of their claims against the bank. The holder of claims against an insolvent corporation cannot set them off against a liability on his stock in a suit by an assignee in bankruptcy. *Sawyer v. Hoag*, 17 Wall. 610; *Sanger v. Upton*, 91 U. S. 56; *Scammon v. Kimball*, 92 U. S. 362; *County of Morgan v. Allen*, 103 U. S. 498. There is no rule of law or equity which entitles stockholders in a contest between themselves and the creditors either to receive a credit for money paid for the stock or to have it repaid them out of the assets of the corporation. *Banigan v. Bard*, 134 U. S. 291; *Scovill v. Thayer*, 105 U. S. 143, 153.

Respondents, having assented to and acquiesced in the decision and action of the receiver, are barred from sharing in the distribution of the fund created out of the corporate assets of the bank. In *re Minnehaha D. P. Assn.*, 53 Minn. 423. In order to rescind re-

spondents must have acted promptly on the discovery of the facts entitling them to rescind and before the insolvency of the corporation. *Elliott, Corp.* § 176. Conant's complaint does not state a valid claim and must be disallowed because he did not allege what he paid for these claims, and because courts of equity will not permit persons to speculate on a fund which it creates. A person cannot "for a mere song" purchase claims against an insolvent corporation and enforce those claims against the stockholders of the corporation. *Hospes v. Northwestern Mnfg. & C. Co.*, 48 Minn. 174, 199; *Mississippi & M. R. Co. v. Cromwell*, 91 U. S. 643; *Randolph v. Quidnick Co.*, 135 U. S. 457; *Thompson v. Meisser*, 108 Ill. 359, 365; *Gauch v. Harrison*, 12 Ill. App. 457; *Bulkley v. Whitcomb*, 49 Hun, 290; *Holland v. Heyman*, 60 Ga. 174; *Hollister v. Hollister*, 2 Keyes, 245. Interest can be computed from the time when the amount due from the stockholders becomes liquidated. *Thompson, Liab. Stockh.* § 374; *Burr v. Wilcox*, 22 N. Y. 551; *Mason v. Alexander*, 44 Oh. St. 318; *Handy v. Draper*, 89 N. Y. 334; *Wheeler v. Millar*, 90 N. Y. 353; *Cleveland v. Burnham*, 64 Wis. 347; *Bank v. Warren*, 52 Mich. 557; *Casey v. Galli*, 94 U. S. 673. The new stockholders are liable for all the debts of the bank, whether incurred before or after the creation of their stock. *Olson v. Cook*, 57 Minn. 552; *Gebhard v. Eastman*, 7 Minn. 40 (56).

Chas. W. Bunn and *Chas. C. Willson*, for respondents.

The bank had no common-law or implied authority to increase its capital stock. Unless there was a statute authorizing the increase, the new stock was void. *Morawetz, Priv. Corp.* (2d Ed.) §§ 434, 761; 1 *Cook, Stockh.* (3d Ed.) §§ 281, 292; *Scovill v. Thayer*, 105 U. S. 143; *Sutherland v. Olcott*, 95 N. Y. 93; *New York v. Schuyler*, 34 N. Y. 30; *Salem v. Ropes*, 6 Pick. 23; *Sewell's Case*, L. R. 3 Ch. App. 131, 139. A mere irregularity in issuing stock which the statute permits to be issued is insufficient to vitiate the stock; but if issued contrary to law and without authority under the statute, the stock is void and the holder cannot be made to pay the double liability imposed by G. S. 1878, c. 33, § 21. He is not a stockholder. 1 *Cook, Stockh.* §§ 281, 288, 292; 2 *Morawetz, Priv. Corp.* §§ 763, 849; *Winters v. Armstrong*, 37 Fed. 508; *American v. Boston*, 139 Mass.

5; *Stephens v. Follett*, 43 Fed. 842; *New York v. Schuyler*, supra; *Scovill v. Thayer*, supra. If the bank had no authority to issue the new stock, then the defendants who took it are still creditors of the bank to the amount of the claims they surrendered in payment for it. The fact that the whole \$20,000 of new stock was never subscribed rendered the subscriptions invalid as against the bank and its prior creditors. The cases in support of this position are collected and cited in *Eaton v. Pacific Nat. Bank*, 144 Mass. 260, 274.

There is no estoppel of the new stockholders. 1 *Cook, Stockh.* §§ 292, 298. Such new shares are void, although the holder take part in corporate meetings and serve as an officer or agent of the bank. No person is entitled to give the bank credit on the faith of shares which it had in law no authority to issue. 2 *Morawetz, Priv. Corp.* (3d Ed.) §§ 765, 849; *Scovill v. Thayer*, supra; 1 *Cook, Stockh.* (3d Ed.) § 292. Creditors who trusted the bank before the attempted increase have no greater rights as against the new stockholders than has the bank itself. The purchasers have the same right to rescind the purchase and avoid the double liability that they would have if they were suing the bank in equity to cancel the stock and recover the purchase money. *First Nat. Bank v. Gustine Mining Co.*, 42 Minn. 327; 2 *Morawetz, Priv. Corp.* (3d Ed.) §§ 763, 832, 833, 849; *Scovill v. Thayer*, supra; *Handley v. Stutz*, 139 U. S. 417, 435. Interest cannot be recovered upon the double liability prior to the entry of judgment in this action determining what per cent. of that liability will be required to pay the debts. The amount must be liquidated before it will bear interest. *Casey v. Galli*, 94 U. S. 673-678; *Munger v. Jacobson*, 99 Ill. 349; *Cole v. Butler*, 43 Me. 401; *Sackett v. Blake*, 3 Rich. Eq. 225; 1 *Cook, Stockh.* § 225.

Geo. J. Allen, for respondent Conant.

CANTY, J.

This is the second appeal in this action. See 65 Minn. 90, 67 N. W. 893. The action has since been tried by the court without a jury.

From the findings of fact it appears that on May 16, 1893, the bank suspended payment, and closed its doors. The amount of its

capital stock was then \$25,000. Thereafter, on May 26, the creditors of the bank signed an instrument in writing, extending the time of the payment of their claims for one year, and thereupon, on the same day, the bank opened its doors, and resumed business. On June 12, all of the stockholders of the bank except two met at the office of the bank, and passed a resolution purporting to amend the articles of incorporation, so as to provide that the amount of the capital stock might be increased from time to time to an amount not exceeding in the aggregate \$100,000, by a vote of the holders of the majority of the stock in favor of such increase. The court finds that the two stockholders who were not present "subsequently assented to and ratified the proceedings had at said meeting." On July 15 the stockholders met at the same place, and passed another resolution, purporting to increase the stock from \$25,000 to \$45,000. These resolutions were each attested by the secretary of the corporation, and recorded on the books of the bank, but were never signed by the stockholders, and, as we understand the findings, were "published, filed, and recorded with the register of deeds of said Goodhue county, and filed with the state superintendent of banks." Of the \$20,000, proposed increase of capital stock, only \$19,500 was ever subscribed for, and this was issued on the same day, July 15. Most of it was issued to creditors, who took it in lieu of their claims against the bank.

When the bank closed its doors on May 16, it held about \$90,000 of the unmatured notes and securities of the Northwestern Guaranty Loan Company of Minneapolis. This company had suspended payment shortly before, and the bank reopened its doors and resumed business under the belief that the loss on this paper would not exceed fifteen or twenty thousand dollars. But, in the course of time, it was discovered that the loss on this paper was total, and that ever since the failure of the loan company the bank was totally and hopelessly insolvent. This fact becoming apparent, the bank did but little business after it opened its doors. It kept its doors open until January 16, 1894, when this action was commenced, and a receiver appointed.

The trial court held that the new stock is void, and that the holders of the same are not liable as stockholders to the creditors, but

are themselves entitled to participate as creditors in the distribution of the assets of the corporation, and in the amount realized on the stockholders' double liability. Judgment was ordered in favor of all the creditors, including such new stockholders, and against the old stockholders on their double liability. From an order denying a new trial, a large number of the creditors appeal.

1. One of the grounds on which the court held the new stock void is that it was issued without authority of law. Section 13 of article 9 of the constitution authorizes the legislature to pass a general banking law by a two-thirds vote. This provision applies only to a law for organizing banks of issue. *Allen v. Walsh*, 25 Minn. 543; *International Trust Co. v. American Loan & Trust Co.*, 62 Minn. 501, 65 N. W. 78, 632. The defendant bank was organized under G. S. 1878, c. 33, and every bank organized under that chapter, at least after the amendment of 1869 (Laws 1869, c. 85), and before the passage of Laws 1895, c. 145, had the charter powers of a bank of issue, whether it issued any circulating notes or not. The original articles of incorporation of this bank made no provision for increasing its capital stock, and it is contended by respondents that in such a case there was no statutory authority under which such a bank could increase its stock.

2. It is conceded by all parties that Laws 1885, c. 155 (G. S. 1894, § 3400, was not passed by a two-thirds majority; but, even if it had been, it is unconstitutional and void in so far as it attempts to give authority to amend articles of incorporation in other respects than by extending the time of the existence of the corporation, for the reason that no other subject is expressed in the title of the act. The title is "An act to provide for the extension of the term of corporations." The act provides that "any corporation * * * may amend its articles of incorporation in any respect which might have been made part of said original articles." Clearly, this provision is not covered by the title.

3. Laws 1881, c. 77, attempts to amend section 18 of said chapter 33, so as to allow, under certain restrictions, an increase of the capital stock of any bank organized under chapter 33. But it is admitted by all parties that said chapter 77 was not passed by a two-thirds vote of the legislature, and, on examination of the jour-

nals of both houses, we find this to be true. It requires a two-thirds vote to amend the law as well as to pass it originally, and therefore said chapter 77 was never passed, and is unconstitutional and void.

4. We have been referred to no other statutory provision which it is claimed authorizes an amendment of the articles of incorporation so as to provide for an increase of the capital stock of such a bank, unless said section 18 of chapter 33, as originally passed, authorized such an amendment. This section reads as follows:

"Sec. 18. It shall be lawful for any person or association of persons organized under the provisions of this chapter, by his or their articles of association, to provide for an increase of their capital stock, and of the numbers of such association, from time to time, as they may think proper."

Respondents contend that this section authorizes an increase in the capital stock only when the original articles of incorporation provide for such an increase in the future. We are of the opinion that, even though the original articles do not so provide, the section authorized a subsequent amendment of the articles so as to provide for an increase of the capital stock.

Section 14 of chapter 33, as originally enacted, provides that

"No change shall be made in the articles organizing such bank whereby the rights, remedies or securities of existing creditors shall be in any manner impaired."

This evidently contemplates changes or amendments in the articles; but there is no section or provision in the act, unless it is section 18, which expressly authorizes any change or amendment. Again, section 11 provides that the articles of incorporation shall specify:

"Third. The amount of capital stock, and the number of shares into which the same shall be divided."

But, if the articles may provide for a future increase of the stock without specifying definitely that the stock shall be increased, the time of such increase, and the amount thereof, it will be impossible to tell from the face of the articles what the amount of the stock is at any particular time. If it is left discretionary with the stock-

holders or directors to increase the amount of the capital stock at any time without amending the articles, then the articles may or may not specify the amount of the capital stock. But the statute says that they shall specify the amount; and it is the usual legislative policy to require the articles to fix and limit definitely the amount of the capital stock. Then we are of the opinion that the legislature intended to provide, by section 18, that the amount of the capital stock might be increased by an amendment of the articles "from time to time."

5. But this statute is wholly silent as to the method of proceeding to make the amendment. In such a case the same formalities that were required with reference to the execution, filing and publication of the original articles when such a corporation was organized will be required with reference to the amendment. The statute provides that the original articles shall be signed and acknowledged by all the members, but the proposed amendment was not signed by any one except the secretary, and was not acknowledged at all. There are other formalities which were required as to the original articles which were not complied with as to the amendment. Then it is plain that the statute was not complied with in the attempt that was made to increase the amount of the capital stock.

6. But, in our opinion, it does not follow from this that the new stock is void for all purposes. As to creditors who have become such on the faith of the new stock, the holders of the same are estopped to deny its validity. The cases of *Veeder v. Mudgett*, 95 N. Y. 295, and *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, are in point here. In the former case it is said in the opinion, at page 310:

"But where, as in the present case, the abstract power [to increase the capital stock] did exist, and there was a way in which the increase could lawfully be made, and the creditors could, without fault, believe that the increase had been lawfully effected and the necessary steps had been taken, there the doctrine of estoppel may apply, and the increased stock be deemed valid as against the creditors who have acted upon the faith of such increase."

This is quoted with approval in the latter case, and both cases

are cited with approval in *Olson v. State Bank*, 67 Minn. 267, 69 N. W. 904.

7. The creditors are presumed to have trusted the bank on the faith of the increase of the stock from the time that such increase was voted. *Handley v. Stutz*, *supra*. The creditors who have appealed hold in the aggregate claims to the amount of only \$674.41, that were incurred since the resolution to increase the stock was passed on July 15.

8. But, as against the creditors who became such before this resolution was passed, the holders of the new stock are in a position to assert its invalidity, unless there is in favor of these creditors some special equity which estops these new stockholders. It is claimed by these creditors that before the bank reopened its doors on May 26, they extended the time of payment of their claims on the faith of the increase of the capital stock; and therefore, as to them also, the new stockholders are estopped to deny the validity of the new stock. The trial court finds that on said day those creditors signed an instrument in the following form:

"Zumbrota, Minnesota, May 26, 1893.

"For value received, the undersigned, creditors of the Bank of Zumbrota, hereby agree to extend the time of payment of our claims against said bank for twelve months from this date."

The court further finds that the same was executed "relying on the statement of some of the officers of the bank that its capital stock would be increased \$20,000," if the instrument was signed. It does not appear what officer or officers of the bank made this statement, or that they had any authority to represent or bind the bank or its stockholders in making it. Such officer or officers did not have the power to amend the articles so as to increase the capital stock. It does not appear that the new stockholders had any notice or knowledge of this statement when they subscribed for the new stock. It is not found that the statement was made fraudulently or with intent to deceive, or that such statement is any part of the contract by which the time of payment was extended. The extension was made before the resolution to increase the stock was passed. Then we cannot hold that these creditors are in a position to invoke any such estoppel.

9. It is contended by appellants that the court erred in allowing the new stockholders to stand as creditors.

Appellants cite *Scovill v. Thayer*, 105 U. S. 143, 152, as authority for the proposition that after the corporation has become bankrupt, and the rights of creditors have attached, a dividend cannot be allowed for money paid for void stock issued while the corporation was a going concern. Whether or not the point was there correctly decided we shall not consider. While it seems that a few of the new stockholders paid some small amounts in cash when the new stock was issued, counsel have not specified the names or amounts or portions of the record in which we may find them, and we do not propose to examine the large record in this case for the purpose of ascertaining all the facts as to these matters. Then we shall treat the case as if the whole consideration for the new stock was the pre-existing indebtedness of the corporation to the new stockholders. We are of the opinion that the creditors who took the new stock for the amount of their claims are entitled to stand as creditors as against the other old creditors and the old stockholders. A rescission of the contract must place them in statu quo, and restore to them the character of creditors.

As an additional ground for relieving the new stockholders, and permitting them to stand as creditors, the court found that there was a mutual mistake of fact in this: That all parties, at the time the new stock was subscribed for, believed the bank to be solvent, and the new stockholders were induced so to believe by the false and mistaken misrepresentations of one of the officers of the bank, who had investigated the affairs of the insolvent loan company, and that by reason of this mutual mistake the new stockholders were entitled to rescission. Whether the court was warranted in making these findings we need not consider, as, in any event, the effect of this alleged mutual mistake in relieving the new stockholders is not any greater than the effect of the illegality in failing to comply with the statute in increasing the stock.

10. The receiver appointed to sequester the corporate assets, and distribute them among the creditors, assumed to allow and disallow the claims of creditors. He disallowed the claims of the new stockholders for which they took the new stock, and allowed the

claims of other creditors, and paid them a dividend of 20 per cent. thereon. The trial court allowed both classes of claims, as aforesaid, and ordered that the former class receive, first, a 20 per cent. dividend, and that both classes share alike out of any balance remaining for distribution after paying this dividend. This is assigned as error. The holding is correct. The court, and not the receiver, is the proper party to allow or disallow these claims, and it was not necessary for the creditors in the former class to appeal from the receiver's action. Neither does it alter the case that the dividend paid by the receiver was paid out of the corporate assets, and that the former class of creditors is to be put on an equality with the latter, by being paid out of the fund to be derived from the stockholders' liability.

11. The trial court attached to his finding, as a part of the same, Exhibit No. 6, being a list of the creditors who failed to intervene in this action or exhibit their claims, and the amount due each of these creditors. Appellants contend that the court ordered judgment in favor of these creditors also. The order for judgment, which is somewhat vague and general, is susceptible of that construction, and should be so modified as to order judgment in favor of those creditors only who have appeared and exhibited their claims, and whose claims have been allowed.

12. After the receiver had paid the 20 per cent. dividend as aforesaid on the claims specified in said list No. 2, the intervenor, Conant, purchased all of these claims from the original holders thereof, and paid them therefor 15 per cent. of the original face of the claims. The court below ordered judgment for Conant for the full amount of the balance due on these claims. This is assigned as error. On the authority of the cases hereinafter mentioned, appellants contend that he should not be allowed to speculate on these claims.

In *Randolph v. Quidnick Co.*, 135 U. S. 457, 10 Sup. Ct. 655, it was held that a court of equity will not aid the assignee of a speculative claim to enforce the same, where the disproportion between the price paid for the claim and its face value is so great as to shock the conscience. This, in substance, was the holding of this court in *Hospes v. Northwestern Mfg. & C. Co.*, 48 Minn. 174,

199, 50 N. W. 1117, and was also the holding in *Mississippi & M. R. Co. v. Cromwell*, 91 U. S. 643. No such disproportion exists in this case.

In *Thompson v. Meisser*, 108 Ill. 359, 365, *Gauch v. Harrison*, 12 Ill. App. 457, and other cases, it is held that, as to the stockholders' liability, the stockholders stand in a fiduciary relation to each other, similar to that of one partner to another, and that, if one stockholder buys up claims against the corporation at a discount, he can be allowed only what he paid for them, in a suit to enforce the stockholders' liability. Conant was not an officer or stockholder of this bank; but it is claimed by appellants that he was furnished the money to buy these claims by two of the officers and stockholders, and holds the claims for them. On this point the court has made no finding, and has not been requested to do so. For this reason, the question cannot be reviewed on appeal.

13. In the order for judgment the court ordered that no interest should be computed on the amount of each stockholder's liability prior to the time of the entry of judgment. This is assigned as error. The amount due from any one stockholder cannot be determined except by a proceeding in equity, under chapter 76, to ascertain the total amount of indebtedness, and apportion it among all the stockholders. Until this is determined, the liability does not become liquidated, and no interest accrues on it. *Thompson, Liab. Stockh.* § 374. But, under our statute, interest accrues on an unliquidated claim, as well as on a liquidated one, from the time of rendering the verdict or decision. *G. S. 1894*, § 5504. Therefore the court should have allowed interest from the time of filing its findings and order for judgment.

14. One question remains: What is the extent to which the new stockholders are liable to the new creditors who have appealed? That liability must be determined on the same basis as if the new stockholders were liable also to the old creditors, who did not take new stock in lieu of their claims. If the total aggregate double liability of such old and new stockholders equaled or exceeded the amount of such old and new claims, and if we could say, in advance of the entry of judgment and issue of execution, that all the old and new stockholders are solvent, so that such total liability would

pay all of such claims in full, the liability of the new stockholders to the new creditors could be ascertained by apportioning pro rata the liability for the new claims between the old and the new stockholders. Thus, there are \$25,000 of the old stock and \$19,500 of the new stock, and the new stockholders would be required to pay $\frac{195}{445}$ of \$674.41, the amount of the new claims.

We can with reasonable certainty say, in advance, that the new stockholders are solvent for the purposes of this case, because the amount which they, standing as creditors, will collect from the old stockholders, should be applied, so far as necessary, in payment of the amount which they, standing as such new stockholders, should pay to the new creditors. But we cannot say, in advance of the issue of execution, that the old stockholders are solvent. *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069.

Let us suppose that, after the return of execution against the old stockholders, it were found that all of them, except a number holding in aggregate only \$10,000 of stock, were insolvent, and that the double liability on this \$10,000 of old stock and on the new stock equaled or exceeded the amount of such old and new claims; then the apportionment of the liability for the new claims should be made between these solvent old stockholders and the new stockholders, and the new stockholders would in that case be liable for $\frac{195}{295}$ of the \$674.41 due on the new claims; the solvent old stockholders should pay the balance, the other $\frac{100}{295}$ of this \$674.41. But if such total, aggregate, double liability of the solvent old stockholders and the new stockholders does not equal the amount of such old and new indebtedness, then the new stockholders should pay proportionately less. For instance, if such aggregate liability should equal only 80 per cent. of such total claims, then the new stockholders should pay only 80 per cent. of the amount of liability above apportioned against them. It must be remembered that, in making this apportionment as between the old and new claims, none of the old claims for which new stock was taken must be considered.

It is admitted by all parties, and the court in effect finds, that, if the new stockholders are allowed to stand as creditors as against the old stockholders, the total double liability of the latter does

not equal the aggregate amount of claims to be satisfied out of that liability. Therefore it is proper to order judgment and execution against the old stockholders for the full amount of their double liability and interest thereon since the filing of the findings of the trial court. The judgment should further provide that, on the return of execution, the court shall, on proper equitable principles, determine the amount which the new stockholders shall pay to the new creditors; that this amount shall be deducted from the share of such new stockholders so collected on execution; and that, for the balance due the new creditors, they shall participate equally with the other creditors in the distribution of the amount so collected on execution; and that the whole amount so collected shall be distributed under the order of the court.

The action should be remanded to the court below, with directions to modify its conclusions of law and order for judgment in conformity with this opinion. So ordered.

THOMAS BRUSEGAARD v. ANDREAS UELAND.

May 19, 1898.

Nos. 10,967—(75).

72	283
74	474

Bank—Receiving Deposit when Insolvent—Knowledge of Insolvency not Proved.

On the petition and answer, *held*, the petitioner has not established the fact that, when the insolvent bank received the deposit from him, its officers knew it was insolvent.

Same—Title to Checks Deposited—Agreement to Charge Back if not Paid.

Petitioner kept an account in the bank, and it received his deposit, consisting of checks, under an agreement that they should be credited to that account, and, if not paid on presentation, they should be charged back against his account. *Held*, the title to the checks passed to the bank, subject to the condition, intended for its protection, that, if the checks were not paid on presentation, it could rescind the act of giving credit, and its title would thereupon be divested.

Same—Failure of Bank before Collection—Title not Devested.

Held, further, the failure of the bank after it had received the checks, and before the same were collected, did not divest its title.

Appeal by petitioner from an order of the district court for Hennepin county, Russell, J., denying a petition for an order directing defendant receiver to pay to petitioner the sum of \$1,192.36. Affirmed.

John H. Robertson, for appellant.

In support of his contention that by the terms of the agreement the title to the checks did not pass, counsel cited: *Branch v. U. S. Nat. Bank*, 50 Neb. 470; *In re State Bank*, 56 Minn. 119; *McLeod v. Evans*, 66 Wis. 401; *In re Johnson*, 103 Mich. 109; *Third Nat. Bank v. Stillwater Gas Co.*, 36 Minn. 75.

A. Ueland, for respondent.

CANTY, J.

At 12:30 p. m., December 29, 1896, the Washington Bank of Minneapolis suspended payment, and closed its doors. It was taken possession of by the state bank examiner that same afternoon, and on the next day a receiver in insolvency was appointed for it by the court. At and prior to these times the petitioner, Brusegaard, was doing business as a banker at Brandon, Minnesota, and kept an account in the Washington Bank, which was his correspondent. He filed a petition in the insolvency proceedings, in which he states that he had for some time prior to December 29 remitted to said bank,

“For collection and credit, the drafts and checks of other banks, received by him from his customers and others; * * * that during all said time it was understood and agreed between your petitioner and said bank that his remittances of checks, drafts, and other items should be credited to the account of your petitioner in said bank, and that, if any such check or draft remitted by him for collection and credit to said bank should not be paid upon presentation, that the same should be charged back against his said account; and that all remittances of checks and drafts (other than currency or specie) should be credited to him upon receipt thereof, only conditionally upon being paid.”

These allegations of the petitioner are not denied by the answer.

On December 26 he remitted to the bank, pursuant to this agreement, three checks, drawn by others, for the aggregate amount of \$1,324.84. The bank received the checks on the morning of December 28, and on that day sent these checks, together with others, amounting in all to \$2,380.35, to the Scandinavian-American Bank of St. Paul, for collection and deposit to the credit of the Washington Bank. All of the checks sent by petitioner were collected on that day, and some of the others. The account of the Scandinavian-American Bank with the Washington Bank then stood as follows:

Balance to the credit of Washington Bank prior to the remittance of that day	\$ 609 51
Checks and drafts of others collected that day.....	962 84
Proceeds of appellant's checks	1,324 84
<hr/>	
Total	\$2,897 19
Checks and drafts of the Washington Bank paid by the Scandinavian-American Bank	560 75
<hr/>	
Balance	\$2,336 44

This balance was paid by the Scandinavian-American Bank to the receiver after he had qualified. The facts above recited are not disputed. The petitioner asks that the court declare a trust in his favor on such balance for the amount of the proceeds of said checks which he had so remitted; and that the receiver be ordered to pay him said amount out of said balance. From the order denying his petition he appeals.

The matter was submitted to the court for decision on the petition and answer thereto. While such a matter may be tried summarily, it is a final trial, on the merits, of a substantial right. The parties are entitled to have it heard on competent evidence, and have the right of cross-examination, but they may also waive these rights. The petition alleges

"That at said time of receiving the said three checks, said Washington Bank was insolvent, as was well known to its officers and agents, but was unknown to your petitioner."

The answer denies that

"Any officer of the Washington Bank knew that said bank was insolvent prior to 12:30 o'clock p. m. on the 29th day of December, 1896, which was the time when said bank suspended payment and closed its doors," and alleges "that up to that time said bank met and discharged all demands upon it, and that it was not, prior to that time, insolvent, except in so far as the property owned by the Bank at that time may be insufficient to pay the debts and liabilities of said bank."

This amounts to an admission that on the morning of December 28 the bank was in fact insolvent, in the sense that it had not sufficient assets to pay its debts, but the answer denies that the officers of the bank knew this fact prior to the time the bank closed its doors. Then the petitioner has failed to establish fraud in the receiving of the checks. Of course, if the bank received his checks, knowing that it was insolvent, it would be guilty of fraud, no title to the checks would pass, and he could recover their proceeds, if he could sufficiently trace such proceeds into the hands of the receiver.

Appellant contends, however, that, by the terms of the agreement under which the checks were sent to the bank, the title to the checks did not pass to it; that it only acquired title to the proceeds of the checks after they were collected.

It appears from the part of the petition first above quoted that the checks "should be credited to the account" of the petitioner, and, if not "paid upon presentation, that the same should be charged back against his said account." This condition did not, as appellant contends, prevent the title to the checks from vesting in the bank. The condition was for the benefit of the bank, not for the benefit of appellant; and the title to the checks vested in the bank at the time it received them, subject to the condition that, if they were not paid on presentation, they should be charged back against his account, and the title of the bank would thereupon be divested. This condition never became operative, and therefore the title acquired by the bank on receipt of the checks has never been divested, even if it appears, as appellant contends, that the bank closed its doors before the checks were actually collected. If the title to the checks once vested in the bank, the closing of its doors would not, in the absence of fraud, divest that title.

This disposes of the case, and the order appealed from is affirmed.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY v. SILAS
KING and Others.

May 19, 1898.

Nos. 10,980—(105).

**Record of Mortgages—Consecutive Numbers—G. S. 1894, § 767—
Presumption as to Priority.**

Where several mortgages, executed on the same day on the same land, were recorded at the same hour, and each received document numbers in the register's office, *held*, under G. S. 1894, § 767, it must be presumed, in the absence of any showing to the contrary, that they take priority in the order in which they are numbered.

Foreclosure of First and Second Mortgages—Notice of Intention to Redeem—Redemption by Junior Creditor from Both Sales—Lien of Senior Creditors Extinguished—Creditor's Right.

The year to redeem from the foreclosure sale under the second mortgage expired 30 days before the year to redeem from the foreclosure sale under the first mortgage. No redemption was made from either sale within the year allowed to the owner to redeem. Eighteen subsequent lien creditors filed notices of intention to redeem from each sale, so that the successive 5-day periods allowed to them in which to redeem, in the order of seniority, after the year, extended the time of the eighteenth or junior creditor to 90 days after the sale. The other 17 failed to redeem from the earlier sale, and on the ninetieth day after that sale the eighteenth creditor redeemed from both sales. *Held*, the liens of the other 17 were cut off and extinguished by their failure to redeem from such earlier sale, and therefore they could not redeem from the later sale on the first mortgage. *Held*, further, the redemption of the eighteenth creditor from the later sale was not premature, although the redemption was made 25 days before his 5-day period would arrive in which to redeem from that sale. The provision of statute extending the period of redemption for each of these successive 5-day periods is intended for the benefit of the creditors, not for the benefit of the holder of the sheriff's certificate; and, as long as it did not interfere with the rights of any other person entitled to redeem, the eighteenth creditor could waive such extension of time.

72 287
80 80

Same—Assignment of Sheriff's Certificate of Sale to Lien Creditor—Merger.

Said eighteenth creditor took a conveyance from the holder of the sheriff's certificate of the foreclosure sale of the second mortgage two days after the year to redeem from that sale expired, and subsequently redeemed from himself at the time above stated. *Held*, his right as such lien creditor did not merge in the title so acquired, so as to prevent him from redeeming as such creditor.

Appeal by plaintiff from an order of the district court for Hennepin county, Johnson, J., denying a motion for a new trial in an action of ejectment. Affirmed.

Charles J. Tryon, for appellant.

Roberts & Sweet, for respondent King.

John H. Long, for the other respondents.

CANTY, J.

1. On October 1, 1892, one Fish was the owner of the land here in question, and on that day mortgaged it to plaintiff, and the mortgage was recorded. Thereafter, on February 25, 1896, Fish conveyed the land to one Long, who assumed and agreed to pay the first mortgage, and executed to Fish a second mortgage, which was recorded. The second mortgage was foreclosed by a sale made on January 20, 1896, to one Flynn, the assignee of the mortgage. Thereafter the first mortgage was foreclosed by a sale made on February 19, 1896, to this plaintiff. On January 18, 1897 (two days before the time to redeem expired on the foreclosure of the second mortgage), Long executed and delivered to each of 18 different persons a different mortgage on this land. Each of these mortgages purported to be a first lien on the land. Five of these mortgages were recorded at the same hour on that day, and received successive document numbers in the register's office; five more were recorded at the same hour on the 19th, and received later successive document numbers; five more were recorded at a later hour on that day, and received later successive document numbers; and the other three were recorded at still a later hour on that day, and received still later successive document numbers.

Appellant contends that all of these 18 mortgages are co-ordinate, but we cannot so hold. G. S. 1894, § 767, provides that the

number on the instrument shall be prima facie evidence of the priority of its registration; and, in the absence of any showing to the contrary, we must hold that these mortgages take priority in the order in which they are numbered.

2. Each of said 18 mortgagees, at the time he filed the mortgage as aforesaid, filed also with the register a notice of intention to redeem, under his said mortgage, from the foreclosure sale of said second mortgage, and a notice of intention to redeem, also, from the foreclosure sale of said first mortgage. The defendant King is mortgagee in the last of this series of 18 mortgages, and, under rule above stated, we must hold that his mortgage is subsequent to all of the others.

The year in which the owner might redeem from the foreclosure sale of the second mortgage expired on January 20, 1897, and no such redemption was made. Two days later, on January 22, 1897, Flynn assigned the sheriff's certificate issued to him on this sale to King, by an instrument which also conveyed the land to King. No redemption was made or attempted from either foreclosure sale prior to April 20, 1897. But on that day King, as such eighteenth mortgagee, went through the form of redeeming from himself from the foreclosure sale of the second mortgage, and on the same day he redeemed from the foreclosure sale of the first mortgage. Our statute (G. S. 1894, § 6044) provides that, if no redemption is made within the year, the senior creditor, having a lien, may redeem within five days thereafter,

"And each subsequent creditor, having such lien, within five days after the time allowed all prior lienholders, as aforesaid, may redeem, * * * provided, that no creditor shall be entitled to redeem, unless, within the year allowed for redemption, he files notice of his intention to redeem in the office of the register of deeds."

It will be observed that, prior to King, there were 17 mortgagees who had a right to redeem from the foreclosure of the second mortgage, and that after the year expired these 17 had each five days, successively, in the order of seniority, in which to make his redemption; so that the 17 had in all 85 days after January 20, 1897, in which to redeem, before it came King's turn, and he had five days thereafter in which to redeem, as such eighteenth mortgagee. He

redeemed on the fifth day thereafter, so that he made such redemption at a proper time. But these 17 prior mortgagees had also five days each after the year expired in which to redeem from the foreclosure sale on the first mortgage. The year expired February 19, 1897. But, instead of waiting 85 days after that date, King redeemed from that sale on April 20,—the sixtieth day after that date. Plaintiff has not accepted or received the redemption money from the sheriff. No question of fraud in extending the time to redeem is raised in this case, such as was raised in *New England M. L. Ins. Co. v. Capehart*, 63 Minn. 120, 65 N. W. 258.

On these facts, the court below held that King made a valid redemption from the foreclosure sale on the first mortgage; that he is the owner of the land; and judgment was ordered in his favor. From an order denying a new trial, plaintiff appealed.

Appellant contends that King's redemption from the later foreclosure sale was premature, and is therefore void; that he should have waited until the end of the 17 5-day periods allowed by the statute to the other 17 prior mortgagees. While, under the statute, he might have waited until the end of that time, we cannot hold that he was obliged to do so. On April 20, when King redeemed, each of the 17 prior mortgagees had lost his lien by failing to redeem from the foreclosure sale of the second mortgage, and therefore could not afterwards redeem from the foreclosure sale of the first mortgage. *Lowry v. Akers*, 50 Minn. 508, 52 N. W. 922. See, also, *Abraham v. Holloway*, 41 Minn. 156, 42 N. W. 867. Then, within 60 days after the year to redeem from the sale on the first mortgage expired, all of the lienholders prior to King had been cut off; and why was King bound to wait 25 days more before he redeemed, merely because the notices filed by such prior lienholders, whose rights are now extinguished, gave him that length of time?

The provisions of the statute extending the time of redemption for each of such successive 5-day periods are intended for the benefit of the creditors who give notice of their intention to redeem, not for the benefit of the holder of the sheriff's certificate. King's redemption on April 20 from the sale on the first mortgage did not and could not interfere in any manner with the rights of any other person entitled to redeem, and, under these circumstances, King

had a right to waive the extension of time which the statute gave for his benefit. We are not unmindful of the fact that a subsequent lien creditor holding a claim against King filed a notice of intention to redeem. But King's earlier redemption did not interfere with the rights of his creditor.

3. We are also of the opinion that King's rights as mortgagee did not merge in the title which he acquired by the conveyance made to him on January 22, 1897, two days after the year to redeem from the foreclosure of the second mortgage expired. He did not take possession until after he redeemed on April 20. In the meantime, matters remained unsettled. The title he acquired by such conveyance might at any time have been taken from him by a redemption by any one of the other 17 mortgagees; and, if it had been so taken, he would still have had to redeem in his turn, as the eighteenth mortgagee. The doctrine of merger is a flexible, equitable doctrine. Each case depends on its own circumstances, and, under the circumstances of this case, we cannot hold that there was a merger which prevented King from redeeming as creditor.

This disposes of all the questions raised having any merit, and the order appealed from is affirmed.

BRIDGET McBRIDE v. ST. PAUL CITY RAILWAY COMPANY.

May 19, 1898.

Nos. 10,991—(93).

Verdict Sustained by Evidence.

Held, the evidence will sustain a verdict for the plaintiff.

Street Railway—Injury to Person Entering Car—Incompetency of Trainmen—Charge of Court—Fonda v. St. Paul, 71 Minn. 438, Followed.

The plaintiff, a passenger, was injured while attempting to board one of defendant's street cars, and claims she was injured by the negligence of the servants of defendant in charge of the car. *Held*, following *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438, it was error to charge the jury that they may consider facts proven as to the competency or incompe-

tency of the trainmen, which tend to show that the act in question was not done by the motorman in a reasonably careful manner.

Same—Damages—Permanent Injury—Reasonable Certainty—Charge of Court.

Held, the plaintiff is not entitled to recover for permanent injury unless there is reasonable certainty that the injury is permanent. Measured by this rule, a certain part of the charge is *held* to be erroneous. Whether such rule is a correct one to apply on the introduction of evidence, *quære*.

Appeal by defendant from an order of the district court for Ramsey county, Kelly, J., denying a motion for judgment notwithstanding a verdict in favor of plaintiff for \$800 and denying a motion for a new trial. Reversed and new trial granted.

Munn & Thygeson, for appellant.

In order to recover for future permanent injury the evidence must show that such injury is reasonably certain to follow. It cannot be the basis for the assessment of damages if it rests on speculation and conjecture. *L'Herault v. City of Minneapolis*, 69 Minn. 261; *Strohm v. New York*, 96 N. Y. 305; *Hardy v. Milwaukee*, 89 Wis. 183; *Block v. Milwaukee*, 89 Wis. 371; 2 *Shearman & R., Neg.* § 743; *White v. Milwaukee*, 61 Wis. 536; *Fry v. Dubuque*, 45 Iowa, 416; *Curtis v. Rochester*, 18 N. Y. 534; *Atkins v. Manhattan*, 57 Hun, 102; *DeSoucey v. Manhattan (Com. Pl.)* 15 N. Y. Supp. 108; *Ohio v. Crosby*, 107 Ind. 32; *Cleveland v. Newell*, 104 Ind. 264; *Bailey v. Westcott*, 14 Daly, 506.

John L. Townley, for respondent.

CANTY, J.¹

Plaintiff claims that while attempting to board one of defendant's street cars as a passenger she was caught between the gates, which closed in upon her as she was about to step from the ground to the lower step of the car, and was injured. These gates close in upon the lower step, are opened to receive and let off passengers, and are operated by a lever in the hands of the motorman, who stands on the front of the car. She brought this action to recover damages for the injury, alleging that it was caused by de-

¹ BUCK, J., did not sit.

fendant's negligence. On the trial she had a verdict, and from an order denying a new trial defendant appeals.'

1. We are of the opinion that the evidence will sustain a verdict for plaintiff.

2. When charging the jury, the court gave defendant's second request as modified. All of this part of the charge which it is necessary to consider is as follows:

"The competency or incompetency of the trainmen in charge of this car can have no bearing upon this case in determining the liability or want of liability of the defendant, and you are instructed to disregard all evidence and argument of counsel on the subject of the competency or incompetency of the trainmen, or either of them, except that I modify these instructions to this extent, and to this extent only: except that, if the jury find from the evidence that the plaintiff was caught in the gates of the car at the time and place as she has testified, they may consider any fact proven to their satisfaction, and that includes the competency or incompetency of these officials, which tends to show that the gates at that time and place were or were not handled by the motorman in charge in a reasonably careful manner."

The modification was excepted to, and is assigned as error. That it is erroneous is settled by *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438, 74 N. W. 166, and nothing need be added to what is there said.

3. In charging as to the amount of damages which plaintiff is entitled to recover, the court charged the jury as follows:

"You have a right to take into consideration * * * also, if there is any evidence to sustain it, the probability or improbability of this accident resulting in any permanent injury to the plaintiff's health."

This was excepted to, and is assigned as error. In our opinion, this part of the charge is erroneous. Plaintiff is not entitled to recover for permanent injury unless there is reasonable certainty that the injury will be permanent. *Hardy v. Milwaukee*, 89 Wis. 183, 61 N. W. 771; *White v. Milwaukee*, 61 Wis. 536, 21 N. W. 524. While this is the correct rule as applied to this charge, it may be a question whether it is the correct rule as applied to the introduction of evidence. See *Block v. Milwaukee*, 89 Wis. 371, 61 N. W. 1101, where this distinction is made. A dictum of this

court in *L'Herault v. City of Minneapolis*, 69 Minn. 261, 72 N. W. 73, states that the same rule should be applied as to the expert evidence offered on the trial, citing with approval *Strohm v. New York*, 96 N. Y. 305. We are not called upon to dispose of that question at this time. The other questions raised on this appeal are not at all likely to arise on another trial.

The order appealed from is reversed, and a new trial granted.

RUSSELL SAGE v. LARS HALVERSON.

May 19, 1898.

Nos. 11,004—(84).

Estoppel to Deny Landlord's Title—Surrender of Possession—Fraud or Mistake.

The tenant who takes a lease under seal, signed by both parties, cannot, as long as he remains in possession, deny his landlord's title, even though such tenant was in possession when the lease was made, and he claims that he was at that time himself the owner. In order to remove the estoppel, he must surrender the possession. Conceding that he may, without surrendering possession, avoid the estoppel for fraud or mistake, *held*, the evidence does not warrant a verdict in his favor on any such ground.

Action by Russell Sage, as assignee in trust of the Hastings & Dakota Railway Company, in the district court for Chippewa county. From an order, Qvale, J., denying a motion for a new trial, plaintiff appealed. Reversed.

Owen Morris and *Lyndon A. Smith*, for appellant.

C. A. Fosnes, for respondent.

CANTY, J.

This is an action of ejectment for a quarter section of land. Defendant in his answer admits that he is in possession, and, in effect, denies plaintiff's title, and claims to be the owner himself. On the trial defendant had a verdict, and from an order denying a new trial plaintiff appeals.

On the trial defendant sought to prove that he had been in adverse possession of the premises for 15 years prior to December 29,

1893, on which day he took a lease from plaintiff. This lease is under seal, is signed by defendant, and purports to be signed by plaintiff, by his agent. By its terms it leased to defendant the land in question "for the term of the season of 1894, ending October 1, 1894," in consideration of which defendant agreed to pay as rent therefor \$75, "\$15 cash, and \$60 January 29, 1894, according to one promissory note of even date herewith." He executed this note at the time, and paid it in the fall of 1894. He received a duplicate of this lease at the time, which he retained and gave to his lawyer. He subsequently signed an agreement, which also purports to be signed by plaintiff, by his agent, and by the terms of which the lease was extended to October 1, 1895. In consideration thereof defendant agreed to pay \$75 on October 25, 1895, according to the terms of his note. He executed this note to plaintiff, and subsequently paid it. The lease and contract of extension were received in evidence, without any objection on the ground that the authority of plaintiff's agent to sign the contract for him was not proved, and defendant has by the whole course of his conduct admitted such authority. Defendant continued in possession during all of this time, and thereafter to the time of the trial.

We are of the opinion that, under these circumstances, he was estopped to deny plaintiff's title.

"It is a well settled general rule, that a lessee cannot deny the title of his landlord, and this rule applies whether the tenant was in possession before the lease was made or not." 1 Wood, Landl. & T. § 232; Lucas v. Brooks, 18 Wall. 436.

Conceding that the tenant may avoid this estoppel on the ground of fraud or mistake, and conceding, without deciding, that this defendant might have done so under the pleadings in this action, we are clearly of the opinion that the evidence does not warrant a verdict in his favor on any such ground. He testified on the trial that he cannot read English, and claimed that he did not understand what the lease and contract meant; but this claim can be given no weight under the circumstances. Unless he was non compos, he could not have gone on for two years making leases and notes, paying them and paying rent, without knowing what he was

doing. Then, even if the statute of limitations had run in defendant's favor before he signed the lease, December 29, 1893, so that he was then the owner of the land by prescription, and although he was in possession when he executed the lease, he is estopped from denying plaintiff's title as long as he remains in possession. In order to assert his title, he must first surrender possession. The result arrived at is not in conflict with *Clary v. O'Shea*, *supra*, page 105. The doctrine there laid down does not apply to a case where there is a lease under seal signed by both parties.

This disposes of the case, and renders it unnecessary to consider the other questions raised.

The order appealed from is reversed, and a new trial granted.

STATE OF MINNESOTA v. JOHN J. RUE.

May 19, 1898.

Nos. 11,108—(21).

Embezzlement of Notes—Indictment Sufficient without Name of Payee.

1. An indictment for the embezzlement of certain promissory notes *held* sufficient, although it does not state the name of the payee of the notes.

Same—G. S. 1894, § 6709—Without Consent of Owner.

2. In such an indictment, drawn under section 415 of the Penal Code, it is not necessary to state that the property was embezzled without the consent of the owner.

Same—Questions for Jury.

3. *Held*, whether the defendant acted fraudulently or dishonestly, or derived any benefit from the transaction in which it is charged he embezzled his principal's property, was, on the evidence, a question for the jury.

Same—Agent and Trustee—Evidence.

4. *Held*, the evidence warranted a finding that defendant was the agent and trustee of said principal, although he was also employed by another principal, which paid him for all of his services for both.

Same—Corporation de facto—Evidence.

5. The indictment stated that such first-named principal is a corporation. *Held*, the evidence showed that it was, at least, a corporation de facto, and that is sufficient.

Same—Procuring Renewal of Notes to Third Person—Embezzlement.

6. The defendant, as such agent, procured the maker of his principal's notes to renew the same, and make the new notes payable to a third party, who never owned or held them, and defendant subsequently converted them to his own use. *Held*, he was properly indicted for embezzling the new notes.

Same—Proof of Signature—Error without Prejudice.

7. *Held*, if the admission of certain evidence as to the genuineness of a signature was error, it was error without prejudice, because the instrument had already been introduced in evidence without objection on the ground that the signature had not been proved.

Same—Evidence of Value—Expert—Specific Objection.

8. An objection that evidence is incompetent, irrelevant and immaterial does not cover the ground that the witness has not shown himself competent to testify as to value as an expert.

Same—Request to Charge—Reasonable Doubt.

9. A certain request to charge as to reasonable doubt *held* to be an invitation to the jury to disagree, if possible, and it was properly refused.

Same—Intent to Deprive True Owner of Property.

10. The indictment charged that defendant embezzled the property with the intent to deprive said true owner thereof of the property, and with intent to convert the same to defendant's own use. *Held*, it is sufficient to prove the intent to deprive such true owner of his property, whether defendant intended to or did convert it to his own use, or the use of some one else, other than such true owner.

Same—Special Prosecuting Attorney—Discretion of Court.

11. It was, to say the least, discretionary with the trial court to allow, at the request of the attorney general, a private attorney, employed by such owner, to appear and prosecute the defendant; and it does not appear that the court abused its discretion.

Defendant was convicted in the district court for Chippewa county of embezzlement under the following indictment:

"John J. Rue is accused by the grand jury of the county of Chippewa, in the state of Minnesota, by this indictment of the

crime of grand larceny in the second degree committed as follows: The said John J. Rue did on the 16th day of January, A. D. 1896, at the town of Leenthrop, in said county of Chippewa and state of Minnesota, then and there being the agent, servant, bailee, and trustee of William Deering & Co., then and there being a corporation duly incorporated and existing under and by virtue of the laws of the state of Illinois, and he, the said John J. Rue, then and there having in his possession, custody, and control as such agent, servant, bailee, and trustee of the said William Deering & Co., corporation as aforesaid, certain personal property, to-wit: Three certain promissory notes as follows: One note for one hundred dollars due and payable Oct. 1st, 1896; one note for one hundred dollars due and payable Oct. 1st, 1897; and one note for ninety-one and 40-100 due and payable Oct. 1st, 1898, each of said notes being dated on the 11th day of January, 1896, and each bearing interest at the rate of 10 per cent. per annum, interest payable semi-annually, and each duly executed by Thorvald H. Sloan; said promissory notes being ordinary negotiable instruments in writing for the payment of money and evidences of debt, and being then and there of the aggregate value of two hundred and ninety-one and 40-100 dollars, a more particular description of said notes being to this grand jury unknown; and also two certain mortgages securing the payment of said notes heretofore described, to-wit: A certain indenture of mortgage dated January 11th, 1896, made, executed and delivered by one Thorvald H. Sloan and Martha Sloan, his wife, conveying by deed of mortgage the following described land situated in Chippewa county and state of Minnesota, to-wit: The west half of the south-east quarter and the east half of the south-west quarter of section thirty-four, in township one hundred and seventeen, of range thirty-nine, containing one hundred and sixty acres according to the United States Government survey thereof, a more complete description of said mortgage being to the grand jury unknown; and also a certain chattel mortgage executed and delivered on said eleventh day of January, 1896, by the said Thorvald H. Sloan, wherein was conveyed by the said Sloan certain personal property, to-wit: One sorrel horse, ten years old; one chestnut horse, thirteen years old; one gray horse, four years old; one roan mare, four years old; one Van Pach lumber wagon complete; one two-seated spring wagon, used three years; one Deering harvester and twine binder; one Van Brunt & Wilkins drill; one Boss drag; one red cow, nine years old; one red cow, ten years old; one black muley; one red muley heifer, two years old; with increase from said stock; also all crops of every kind, nature and description, consisting of wheat, oats, barley, corn, and flax, which have been or may be hereafter sown, grown, planted, cultivated, and harvested during the year 1896, on the following described real estate situated in the county of

Chippewa, state of Minnesota, as follows, to-wit: The west half of the south-east quarter and the east half of the south-west quarter of section thirty-four, township one hundred and seventeen, of range thirty-nine, a more particular description of said chattel mortgage being to the grand jury unknown; each of said mortgages, before referred to, being executed and delivered as security for the payment of the notes hereinbefore described according to the condition thereof; all of said personal property, notes, and mortgages aforesaid, being then and there of the value of two hundred and ninety-one and 40-100 dollars, and all and each of said notes and mortgages aforesaid were then and there the property of the said William Deering & Co., corporation as aforesaid, did then and there wilfully, unlawfully, knowingly, ~~wrongfully~~, fraudulently, and feloniously appropriate the said property and all thereof to ~~his own use~~, with intent then and there had and entertained by him, the said John J. Rue, to deprive the said William Deering & Co., corporation as aforesaid, the true owner of said property, of its said property and to convert the same to the use of him, the said John J. Rue, and did then and there convert the same to his own use, contrary to the statutes in such case made and provided and against the peace and dignity of the state of Minnesota."

From an order, Qvale, J., denying a motion for a new trial, defendant appealed. Affirmed.

Lyndon A. Smith, for appellant.

The verdict is not sustained by the evidence. Defendant's acts were within the authority given by his principal. The notes embezzled, if any, were the old notes and not the new ones. *Com. v. Butterick*, 100 Mass. 1; *Bork v. People*, 91 N. Y. 5. The identical money received must be that embezzled. *Webb v. State*, 8 Tex. App. 310. He had the right to renew as he did, or he did not. If he had that right, then his acts were justified. If not, then the title to the old notes remained in Deering & Co. If it remained in Deering & Co., then the old notes were converted in February. *Nichols v. Minnesota*, 70 Minn. 528. Defendant is not indicted for conversion of the old notes. The new notes belonged to Deering & Co. only on election. *Fuller v. Langum*, 37 Minn. 75. They had not elected to claim them. There is no evidence of intent to defraud. There is no evidence of intent to appropriate the notes to the use of defendant, or, in fact, to the use of any other person than the true owner. 1 Bishop, New Crim. Proc. §§ 485, 486. There is

no evidence of such relation between Deering & Co. and defendant as would sustain the conviction of defendant under the indictment for embezzlement by defendant from Deering & Co. The test of such relationship is whether there is a direct relation and compensation. 1 Wharton, *Crim. Law* (10th Ed.) § 1014; *Reg. v. Thorpe*, 8 Cox, *Crim. Cas.* 29. The essence of the crime of embezzlement consists in the relation of clerk or servant. *Reg. v. Tyrie*, 11 Cox, *Crim. Cas.* 241, 245. See *Waterman v. State*, 116 Ind. 51.

The indictment is defective. There is no sufficient description of the property embezzled in that there was no statement that the notes were made to any payee, or the mortgages to any grantee, and instruments without such parties are valueless. *McIntosh v. Lytle*, 26 Minn. 336; *Allen v. Allen*, 48 Minn. 462. The allegation that a further description of these instruments was to the grand jury unknown, is shown by an inspection of the indictment and the evidence in the case to have been untrue, and had it been true it would not have cured a failure to allege that the notes and mortgages were made to a payee whose name is to the grand jury unknown, so as to show that the instruments embezzled were instruments having some legal effect. 1 Bishop, *New Crim. Proc.* §§ 547-550, 552. There is no allegation from whom or in what way the property in question was received. 1 McLain, *Crim. Law*, § 638; 6 Am. & Eng. Enc. 497. There is no denial of consent of owner. 1 McLain, *Crim. Law*, *supra*. There is no distinct allegation of the particular relation of defendant to Deering & Co. 1 Bishop, *New Crim. Proc.* § 332. The indictment does not show with sufficient certainty that defendant, by virtue of his employment, was entrusted by Deering & Co. with the property upon which the charge of embezzlement against him is predicated. *Smith v. State*, 28 Ind. 321; *State v. Wingo*, 89 Ind. 204; *State v. Brown*, 12 Minn. 393 (490).

It was error to refuse to charge that each individual juror must be satisfied beyond a reasonable doubt of defendant's guilt. 2 Thompson, *Trials*, § 2494; *Parker v. State*, 136 Ind. 284; *Grimes v. State*, 105 Ala. 86; *Carter v. State*, 103 Ala. 93; *State v. Witt*, 34 Kan. 488; *Castle v. State*, 75 Ind. 146; 19 Am. & Eng. Enc. 1080. The main issues of a criminal trial should be proven beyond a rea-

sonable doubt, and an instruction to that effect given by the court unrequested. *Davidson v. State*, 135 Ind. 254; *Black v. State*, 1 Tex. App. 368; 2 Thompson, Trials, § 2490; *U. S. v. Reder*, 69 Fed. 965; *Webb v. State*, 8 Tex. App. 310. Where an indictment alleges appropriation to defendant's own use, it is a fatal variance to show that he appropriated it to the use of a third person. 1 Bishop, New Crim. Proc. § 485; 6 Am. & Eng. Enc. 843, and cases cited in note 3; *Rapalje*, Crim. Proc. § 107. Conversion to defendant's own use is a necessary ingredient of embezzlement. *Webb v. State*, supra. The court abused its discretion in allowing a private attorney to prosecute the case. His designation by the attorney general did not give him any rights,—they came, if at all, from the court. Counsel so appointed should not be under a private retainer. *State v. Griffin*, 87 Mo. 608.

H. W. Childs, Attorney General, *Frank M. Nye*, Acting Attorney General, *Oluf Gjerset*, County Attorney, and *C. A. Fosnes*, Acting County Attorney, for respondent.

CANTY, J.

The defendant was convicted of the charge of embezzling three promissory notes and a chattel mortgage, the property of William Deering & Co., a corporation, which notes and mortgage he had in his possession as "agent, servant, bailee and trustee" of said corporation. From an order denying a new trial, he appeals.

1. It is contended by appellant that the indictment is defective because it does not state to whom the notes or any of them were payable. The indictment states the date, amount, time of maturity, and maker of each note, but does not state the payee. It also avers that the notes are the property of said corporation. The indictment is sufficient. See 2 Bishop, New Crim. Proc. § 732, subds. 1, 2.

2. Under the language of section 415 of the Penal Code, it is not necessary to state in the indictment that the property was embezzled without the consent of the owner. No such provision enters into the definition of the offense. The other points urged against the indictment are wholly untenable.

3. It is contended that the verdict of guilty is not sustained by the evidence.

The defendant was in the employ of William Deering & Co., as its agent in collecting its notes and mortgages from the farmers in and around Chippewa county, in this state, from January to August, 1894. In August William Deering & Co. was succeeded in the business of manufacturing and selling machinery by the Deering Harvester Company. Thereafter the latter company acted as the agent of the former in collecting for it the notes and mortgages it had received on its former sales. Defendant continued in the employment until August 31, 1896. After August 25, 1894, he was paid by the Deering Harvester Company, but he collected the notes and securities of both companies. He also held a written power of attorney from William Deering & Co., dated January 2, 1895, which expired December 1, 1895, and another dated August 5, 1896, which expired December 31, 1896. Each of these powers of attorney was duly executed by William Deering & Co., and was held by him during the time it was in force, and authorized him to collect for William Deering & Co. the notes and securities.

On November 18, 1895, he had in his custody three notes made by T. H. Sloan, and indorsed by J. T. Sloan, for the aggregate sum of \$242.60 and accrued interest, payable to William Deering & Co., and its property. On that day he wrote the Deering Harvester Company (which was also the agent of William Deering & Co.) that the notes were worthless, that he had a "chance to close this claim out for \$100 in cash," and advised that the offer be accepted. He received an answer stating,

"One hundred dollars seems a small amount to be accepted in settlement of these notes; yet if, in your opinion, such deal is advisable, you make it. We leave the matter entirely to your own good judgment."

On January 11, 1896, he took T. H. Sloan to the office of one Rollefson, at Montevideo, and there surrendered the notes and mortgage to Sloan, received from him three new notes, signed by him, for the same aggregate amount and accrued interest, amounting in all to \$291.40. The new securities were drawn up by Rollef-

son. The new notes were signed by Sloan's wife, and they were all secured by a second mortgage on certain real estate, a chattel mortgage on the crops thereafter to be grown on this real estate, and on some horses, cows, a wagon, and some farm machinery. These mortgages were executed by Sloan, and they and the new notes were made payable to one John L. Johnson. Five days later, January 16, defendant wrote the Deering Harvester Company, inclosing a draft "for \$100, in settlement in full" of the three notes which were described, the amounts of which were placed in a column, and added together, so as to give the total. The letter contained the following:

"Total, \$242.60; compromise, \$142.60; balance, \$100.00. The maker of this claim, as I made report on November 18th, '95, offering \$100 for the claim, which I accepted in full settlement, security on the four cows, and the heifer and one H. and B. is only 2nd mortgage; the first mortgage being \$400.00; so there is no equity in the chattel security."

The letter then states that T. H. Sloan was drunk most of the time, so that it was difficult to do business with him. It proceeds:

"But to-day I went out after him, and brought him right into town with me, and got the matter closed up, as I figured that whatever there was got out of this claim was clear gain, as very likely the way this party is coming on it would be the best chance to get a dollar out of the claim."

It is further stated that T. H. Sloan and J. T. Sloan are both worthless and insolvent.

Up to the time that the new notes were taken in Johnson's name, he had been the cashier of a bank at Renville, but about this time his connection with the bank ceased. Defendant and Johnson both testified that they had entered into an agreement by the terms of which Johnson was to purchase the old notes for \$100, and defendant was to get them "fixed up" or renewed; and defendant testified that he took the new notes and securities in Johnson's name, pursuant to the agreement. Johnson testified that about this time he ceased to be cashier of the bank, and for that reason could not carry out the agreement, and take the new notes and securities, and pay the \$100 for them. He indorsed the notes with-

out recourse, and assigned the securities in blank, and delivered them back to defendant, who thereafter took them to Rollefson, at Montevideo, received from him \$100, delivered the notes and securities to him, and purchased with the \$100 the draft sent in the letter aforesaid. Defendant testified that he sold the notes and securities to Rollefson. The latter died soon after, and was not a witness in this case. Johnson further testified that, though he offered \$100 for the notes, he did not know Sloan, or know where he lived, or anything about him. He also testified that in September, 1896, just after defendant was arrested on this charge, he came to the witness, showed him the new notes, and requested him to represent that he had bought the notes and mortgages, and paid for them, and had subsequently sold them to Rollefson. Defendant admitted on the witness stand that he made this request, and that he then had the notes in his possession, although he had long before sold them to Rollefson.

It is contended by appellant that the evidence will not support the charge that he acted fraudulently or dishonestly in the matter, or that he ever derived any benefit from the transaction. We are of the opinion that, on the evidence, these questions were for the jury. We cannot recite the many circumstances which show this, and the many explanations made by defendant. The evidence warranted the jury in finding that the new notes were amply secured, and worth their face, and that defendant knew this when he wrote the letter of January 16. It is also apparent from this letter that he suppressed the truth, and stated what was not true in several respects. The evidence warranted the jury in finding that defendant intended to, and did, embezzle and appropriate to his own use what did not belong to him, and that he used the means above stated to facilitate and conceal such embezzlement.

4. We are also of the opinion that the evidence warranted the jury in finding that, at the time in question, defendant was the agent of William Deering & Co., as well as of the Deering Harvester Company; so that it will not be necessary to consider whether the defendant could be convicted on this indictment if he was only the agent of the latter while it was the agent of the former.

5. Whether or not the evidence showed that William Deering & Co. was a corporation de jure, the articles of incorporation and the oral evidence showed, at least, that it was a corporation de facto, and that is sufficient.

6. Appellant further contends that, if the evidence shows that he embezzled anything, it is the old notes, not the new ones, and that, in the absence of proof of a ratification of the transaction by William Deering & Co., an election to take the new notes and securities, a conviction cannot be sustained under the indictment.

We cannot agree with appellant. The new notes were never the property of Johnson, the payee therein named. They never were the property of defendant. The evidence would, as appellant concedes, warrant the jury in finding that he had general authority from William Deering & Co. to take these new notes in the form he has taken them. If Sloan gave them in good faith, William Deering & Co. could not, as between it and Sloan, repudiate the transaction. It follows that the new notes were the property of William Deering & Co., whether it elected to accept them or not; and, if defendant subsequently embezzled them, he is guilty as charged. This is all that it is necessary to say on this point.

7. Exhibit C, the written contract made by defendant and William Deering & Co. when he first entered into its employment in January, 1894, was offered in evidence by the state. Defendant objected to it, but not on the ground that the signatures of the parties were not proved, and the objection was overruled. The state subsequently called a witness who proved the signature of defendant. The instrument was also signed, "William Deering & Co., per Lewis Spooner." The witness stated that he was familiar with the signature of Spooner, and that this was his signature. He stated on cross-examination that he had never seen Spooner write, but knew the signature from having seen it on a great amount of correspondence which he had with the company, in which Spooner had acted for it. A motion then made to strike out the testimony as to the signature on the instrument was denied. If this was error, it was error without prejudice, because the contract had already been received in evidence, and defendant had waived proof of the signature by failing to object on that ground.

8. The sheriff was called as a witness, and asked the value of certain property covered by this chattel mortgage, which property he had taken in replevin. The objection that the question is incompetent, irrelevant and immaterial did not cover the objection now made, that he had not shown himself competent to testify as to the value.

9. It is assigned as error that the court refused to give the third request to charge, which reads as follows:

"It is the duty of the jurors to carefully examine all of the evidence, and consider the same in the light of and in connection with the court's instructions, and honestly endeavor to reach and return a verdict either against or in favor of the defendant; but if a juror, or any juror, after he has duly weighed and considered all of the evidence and the court's instructions, is not then satisfied beyond all reasonable doubt that the defendant is not guilty, it will be the duty of such juror or jurors to vote for the defendant's acquittal, and to refuse to agree to a verdict of guilty. This will be so notwithstanding all other jurors may be satisfied, and express themselves as satisfied, beyond a reasonable doubt of the defendant's guilt; for no single juror who has duly weighed and considered all the evidence in the case, and also the court's instructions, and thereafter and thereupon honestly concluded that the defendant is not guilty or that he is not satisfied beyond all reasonable doubt of the guilt of the defendant, is required to or expected to surrender or abdicate his individual, honest judgment, in order that a majority, or even a large majority, of all the jurors may thereby be enabled with his acquiescence to return a verdict of guilty."

In our opinion, this request is an invitation to disagree, if possible, and was properly refused. The court charged the jury a great many times that they must find defendant guilty beyond a reasonable doubt, and beyond all reasonable doubt, before they could return a verdict of guilty; and the charge was sufficiently favorable to him in this respect.

10. It is assigned as error that the court refused to charge that a verdict of guilty cannot be found for a conversion of the notes by defendant to the use or benefit of any other person than himself. The indictment charges that defendant appropriated the property to his own use with intent to deprive William Deering & Co., the true owner of the property, of its said property, and to convert the same to his own use. Section 415 of the Penal Code provides:

"A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, either [then follows subdivision 1, which deals with larceny and false pretenses, and subdivision 2, which deals with embezzlement] steals such property, and is guilty of larceny."

It will be observed that all of the clauses in the above-quoted first part of the section are in the disjunctive. Construed as it reads, it provides that a person is guilty who took "with intent to deprive or defraud the true owner of his property," whether such person intended to appropriate it to his own use or not, or to the use of any other person or not. Such person is guilty if he intended to deprive the true owner of his property, no matter to whose use he appropriated it, so long as he did not appropriate it to the use of such owner. The common-law crime of larceny has not been changed by this section, but still remains the same. *State v. Friend*, 47 Minn. 449, 50 N. W. 692. *Lucri causa*, or the intent to appropriate the property to the use of the thief or some one else, is not a necessary ingredient in that crime. 2 Bishop, *New Crim. Law*, §§ 846-848; *Williams v. State*, 52 Ala. 411; *People v. Juarez*, 28 Cal. 380; *State v. Davis*, 38 N. J. L., 176; *Delk v. State*, 64 Miss. 77, 1 South. 9; *Phelps' Case*, 49 How. Prac. 437; dissenting opinion of Learned, P. J., in *People v. Woodward*, 31 Hun, 57. But, if this is true as to the crime of common-law larceny, it is equally true as to embezzlement, because this part of section 415 applies to both crimes,—defines them both as far as it goes. Then, if it is not necessary in larceny to prove the intent of the accused to convert the property to his own use, it is not necessary in embezzlement. It is sufficient in any case to prove the embezzlement by the accused, with intent to deprive the true owner of his property.

11. It is assigned as error that a private attorney, who was employed by William Deering & Co., was allowed, on the request of the attorney general, to appear and prosecute the defendant. To allow such counsel to appear was, to say the least, discretionary with the trial court. See *State v. Ward*, 61 Vt. 153, 17 Atl. 483. And it does not appear that the court abused its discretion.

We have examined all the other numerous assignments of error,

and find no error in any of the rulings assailed by them, and find none of them having sufficient merit to warrant any further discussion.

Order affirmed.

C. W. ABRAHAMSON v. L. LAMBERSON and Another.

May 19, 1898.

Nos. 11,157—(155).

Contract for Sale of Land—Assignment by Vendee—Assignee's Right to Damages for Vendor's Torts.

An assignment by the vendee of an executory contract for the sale of real estate *held* to assign all his interest, including the damages which had accrued to him by reason of the torts of the vendor in wrongfully taking possession and committing waste by removing the buildings.

Same—Action for Specific Performance by Vendee's Assignee against Vendor's Grantee—Recoupment of Damages.

Held, in an action for specific performance, commenced by such assignee against the assignee and grantee of the vendor, such damages may be recouped against the amount due as principal or interest of the purchase price.

Same—Vendor's Torts after Assignment—Recoupment as against His Assignee.

Held, further, damages for the torts committed by the vendor after the assignment by him cannot be so recouped as against his assignee.

Same—Vendor's Assignment while Withholding Possession—Recoupment of Damages.

But when the assignment was made while the vendor was wrongfully withholding possession, the damages for the continuance of such wrongful possession may be so recouped.

Same—Possession by Vendor after Assignment—Rights of Assignee—Burden of Proof.

Where the vendor assigned his interest in the executory contract of sale, and continued thereafter in possession, *held* the burden is on his assignee to show in this action what rights under such contract were so assigned to him.

Appeal by defendants from an order of the district court for

Marshall county, Ives, J., overruling a demurrer to the amended complaint. Affirmed.

H. Steenerson and *A. Grindeland*, for appellants.

A. C. Wilkinson, for respondent.

CANTY, J.

This is the third time that the controversy between these parties has come before this court. See *Strandberg v. Rossman*, 59 Minn. 509, 61 N. W. 675, and *Abrahamson v. Lamberson*, 68 Minn. 454, 71 N. W. 676. The latter decision was made in a former appeal in this case. After the case was remanded to the court below, plaintiff amended his complaint, and this is an appeal from an order overruling a demurrer to the amended complaint. The grounds of the demurrer are that the complaint does not state a cause of action, and that several causes of action are improperly united.

From the former opinions it will be seen that the vendor of land under an executory contract wrongfully deprived the vendee of the possession of the land, and under the judgment in the former action the vendee was restored to possession on March 1, 1895. On May 10, 1893, during the pendency of the former action, Rossman, the vendor, assigned his interest in the executory contract to Lamberson, one of the defendants herein, and thereafter, on April 25, 1895, conveyed the premises to Winchester, the other defendant. After the vendee, Strandberg, had recovered possession as aforesaid, to-wit, on July 17, 1895, he assigned his interest in the executory contract to this plaintiff, and delivered possession to him. Thereupon plaintiff brought this action to compel specific performance of the contract by the defendants by the execution and delivery of a deed.

It was held on the former appeal herein that by reason of the effect of the judgment in the former action the plaintiff herein must pay interest from November 17, 1890, the time the vendor wrongfully took possession, until August 2, 1893, the time of the trial of the former action; that by reason of the judgment it was *res adjudicata* that the wrongful eviction did not suspend the payment of interest for this time. Plaintiff in the amended complaint concedes his liability to pay this interest, amounting to \$479.89,

and alleges that he has paid all the interest and principal called for by the contract, except interest for the time from November 17, 1890, the time of the wrongful eviction, to March 1, 1895, the time possession was restored, on the part of the purchase price remaining unpaid during that time. The judgment in the former action does not cover the part of this time subsequent to August 2, 1893, and as to this part of such time plaintiff claims that the withholding of possession suspended the liability to pay interest.

Plaintiff also claims the right to recoup and offset certain damages against all of the interest remaining unpaid. He concedes that, as we held in the opinion on the former appeal herein, the claim for damages for withholding the possession up to August 2, 1893, is *res adjudicata*, and so is the claim for waste committed prior to that time. But he alleges that the profits made out of the possession by the vendor and the defendant Lamberson were more than \$1,000, and it is further alleged that between December 28, 1894, and March 1, 1895, the vendor, Rossman, removed from the premises three buildings, part of the realty, of the value of \$300.

1. Appellants contend that plaintiff has no right to recoup these claims against the claim for the purchase price and interest, for several reasons. It is contended that the assignment by the vendee to plaintiff after these damages accrued did not assign the damages. Whether a bare assignment of the executory contract would assign the damages, we need not consider. It is alleged that said

“Strandberg duly assigned, sold, and transferred the contract hereinbefore mentioned and set forth, together with all his interest therein in and to the lands therein described, together with all the rights, privileges, powers, and liabilities under said contract,” to this plaintiff.

In any event this is sufficiently broad to assign the damages.

2. It is further contended that, even though these damages passed to plaintiff, Rossman, the vendor, alone is liable for them; that these defendants are not liable for them, and that they cannot be recouped as against these defendants.

Clearly, Winchester is not personally liable for any of these damages. If the allegations of the complaint are true, Lamberson is personally liable for such profits as he received, or such as he and

Rossman received jointly, if they were jointly in possession. But Lamberson is not personally liable for the torts committed by Rossman alone. It is alleged that Rossman moved away the buildings after he had assigned the contract to Lamberson. Then the damages caused by the wrongful acts of Rossman in removing the buildings cannot be recouped against the interest so assigned, unless Lamberson consented to, or in some way participated in, such wrongful removal.

But these damages may be recouped against what interest yet remained in Rossman. He continued in possession after he assigned the contract, and for this reason it cannot, as against plaintiff, be presumed that the assignment was an absolute one, which transferred to Lamberson all of the purchase money due on the contract and all of the beneficial interest of Rossman in the property, leaving in him only the naked legal title. It may be that the assignment was only intended as a mortgage, or that it was made fraudulently for the purpose of preventing plaintiff's assignor from recouping such damages as might thereafter accrue to him. The fact that Rossman continued in possession after the assignment is a suspicious circumstance, which throws on Lamberson the burden of showing just what was intended to be transferred to him by the assignment, and that the same was made in good faith.

But the damages for withholding possession may be recouped against Lamberson in any event, and for two reasons: First, he stepped in during the continuance of the tort; and, second, he actually participated in the tort by becoming a joint trespasser. All the damages may be recouped against the interest of Winchester. This right of recoupment is an equitable one, which plaintiff and his assignee had as against Rossman, and plaintiff cannot be deprived of such right by the subsequent transfer of Rossman's interest to some one else. Then the complaint states a cause of action, and there is no misjoinder of causes of action.

Order affirmed.

LUTHER MENDENHALL v. DULUTH DRY GOODS COMPANY and Others.

May 20, 1898.

Nos. 10,951—(82).

Corporation — Liability of Stockholders — G. S. 1894, § 5905—Complaint—Parties.

Held, in an action brought to enforce a stockholder's liability under the provisions of G. S. 1894, § 5905, that the complaint was not demurrable on the ground that it appeared therefrom that there was a defect of parties defendant, in that all of the stockholders of the insolvent corporation had not been joined as such defendants.

Same—Stockholder as Plaintiff—Sufficiency of Complaint.

That it affirmatively appears from a complaint in such an action that the plaintiff is a stockholder in the corporation is no ground for holding that facts sufficient to constitute a cause of action have not been stated.

Same—Assignee of Claim as Plaintiff—Not Necessary to Allege Money Consideration for Assignment.

From the complaint herein it appeared that the action in which plaintiff stockholder obtained the judgment on which this proceeding is founded was based on two notes assigned and transferred to plaintiff by a third party payee therein, "for value received." *Held*, that it was not necessary for plaintiff to allege the money consideration for said assignment and transfer.

Action in the district court for St. Louis county by plaintiff on behalf of himself and all other creditors of the Duluth Dry Goods Company, under G. S. 1894, § 5905, against the Duluth Dry Goods Company and certain of its stockholders, to enforce the constitutional liability of stockholders to creditors. Defendant Ames demurred separately to the amended complaint on the grounds: (1) That there was a defect of parties defendant in that all stockholders had not been made parties defendant; and (2) that the complaint did not state facts sufficient to constitute a cause of action. From an order, Moer, J., overruling said demurrer said defendant appealed. Affirmed.

Arthur P. Lothrop and Henry B. Wenzell, for appellant.

Martin W. Watrous and Walter Ayers, for respondent.

COLLINS, J.

1. The complaint herein is not open to the charge that it appears therefrom that not all of the persons who are or have been stockholders in the corporation have been made defendants, and, consequently, that there is a defect of parties defendant.

Such a defect must affirmatively appear from the pleading itself, and it does not here. There are allegations that of the agreed capital stock of 2,500 shares, of the par value of \$100 each, there have been subscribed 1,309 shares, of the total value of \$130,900; that when these debts were contracted these shares were, and now are, owned and held by the stockholders of the corporation; that these stockholders are certain persons therein named; and that they own and hold the number of shares set opposite their respective names. These numbers aggregate 1,134 shares. Then follow allegations which clearly show that certain other persons owned 175 shares, the balance of the total number subscribed when the debts on which the judgment was obtained were incurred, and that said 175 shares have passed into the hands of other persons, who are named and are made defendants. The contention that, possibly, there might have been intermediate transfers of some of these shares, or that, perhaps, other shares were or have been subscribed for, is without merit.

2. It is also urged that the complaint fails to state facts sufficient to constitute a cause of action.

One of the grounds upon which such a contention is rested is, because it appears from the face of the complaint that plaintiff is one of the stockholders in the insolvent corporation, that he is therefore an improper party to bring an action to enforce the stockholders' liability. While it was said in *Maxwell v. Northern Trust Co.*, 70 Minn. 334, 73 N. W. 173, that a stockholder in an insolvent corporation is an improper person to conduct such a proceeding, it does not follow that a complaint, otherwise sufficient, fails to state a cause of action, because it therein affirmatively appears that the judgment creditor is also a stockholder. Nor does it follow that such a creditor cannot file a complaint and institute a proceeding to enforce the stockholders' liability; for after the proceeding is begun, and the complaint is filed, it is no more that of

the plaintiff than it is of any other creditor who appears, files a claim, and thus takes part in the litigation. The discretion of the court may be exercised at any time as to which creditor shall have general management of the proceeding. In proceedings upon the demurrer interposed by one creditor, the court below could not presume that other creditors had not appeared, filed claims, and thus intervened.

3. It appeared from the complaint that plaintiff did not bring the action which resulted in the judgment on which the proceeding is based as an original creditor of the corporation, but that he brought the action as the assignee of two promissory notes made by the corporation, payable to a third party, and by him indorsed and transferred without recourse, "for value received." There was no allegation as to what sum plaintiff paid for these notes, or that he paid any sum of money whatsoever. It is urged that, for this reason, no cause of action is stated, because this proceeding is in the nature of an equitable action, wherein the respective rights and liabilities as between all parties, the corporation, its stockholders, and its creditors, are to be determined and adjusted; and further that, as between stockholders themselves, the equitable right of contribution exists only in case one pays more than his just proportion of the corporation debts; and also that in a proceeding of this nature the court will not assist the plaintiff stockholder to recover as against his fellows a greater sum than he actually paid for these notes; and that, to state a cause of action, it was necessary for him to allege this exact sum. The further point is made, in this connection, that as the plaintiff is shown to be, and from the outset to have been, a director of the corporation, the law will not permit him to purchase any of its outstanding obligations, but that the purchase, if made, must be held to have been for the benefit of all of the stockholders.

From the articles of incorporation, bearing date August 20, 1890, and made a part of the complaint, it seems that the plaintiff was designated therein as one of the first board of directors. But directors were to be elected on the third Tuesday of January each year thereafter, and there is no presumption that plaintiff has ever been re-elected. According to these articles, plaintiff's term of

office expired in January, 1891. There can be no presumption of his continuance on the board after that time. But even if he remained a director, and the rule of law in reference to his right to purchase outstanding claims, either as such director or as a stockholder, is as contended for, there was no failure to set up a cause of action; for, as owner of the judgment obtained upon the notes, plaintiff was entitled to recover a nominal amount at least. Stockholders may become creditors of a corporation as well as other persons, and the stockholders' liability is enforceable as to all corporate debts without exception. And, as these proceedings are equitable as well as flexible in their nature, there is no difficulty in working out and enforcing through them the rights and liabilities, both legal and equitable, of all creditors and stockholders. *Oswald v. Minneapolis Times Co.*, 65 Minn. 249, 68 N. W. 15; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069. The judgment obtained against the corporation was conclusive upon it and upon the stockholders, and from the complaint it appeared that the notes were transferred for value. Admitting that, as against the other stockholders, plaintiff could recover no more than the sum paid, he was entitled to recover that, at least.

Counsel for appellant stockholder assert that the case of *Hospes v. Northwestern Mfg. & C. Co.*, 48 Minn. 174, 50 N. W. 1117, is directly in their favor upon the point that an allegation of the actual money consideration for the transfer of the notes was absolutely required. In their assertion counsel are mistaken, for there a corporation had issued bonus stock to certain of its stockholders, for which the latter were to pay nothing. The proceeding was against these holders, to compel them to pay to another corporation, organized after the insolvency and receivership of the original corporation, and for its benefit, an amount equal to the alleged par value of the bonus stock. The court held that an equity would not be created and enforced for the benefit of the apparent speculation, and its holding with reference to the sufficiency of the pleading was in view of the equitable rights which plaintiff sought to enforce. Here the plaintiff is attempting to enforce a legal right

through an equitable proceeding. The distinction between the cases is obvious.

Order affirmed.

ELIAS M. SLOGGY v. CRESCENT CREAMERY COMPANY.

May 20, 1898.

Nos. 10,975—(72).

Breach of Contract—Measure of Damages—What Naturally Caused by Breach—Complaint—Nominal Damages.

Tested by the well-settled rule of law that, where parties have entered into a contract which has been broken by one of them, the damages recoverable are such only as may fairly and reasonably be considered as arising naturally from the breach, or such as may reasonably be supposed to have been contemplated by both parties when contracting, the complaint herein stated a cause of action for nominal damages only.

Same—Judgment on Pleadings—Appeal—De Minimis.

In such a case, where the court below ordered judgment for defendant on the pleadings, the rule de minimis is applied on an appeal from the judgment.

Action in the district court for Ramsey county. The case came on for trial before Brill, J., and a jury. Whereupon, before the introduction of any evidence, the court granted defendant's motion for judgment in its favor on the pleadings. From a judgment in favor of defendant, entered pursuant to said order, plaintiff appealed. Affirmed.

J. Henry Hintermister, Jr., for appellant.

Thompson & Thompson, for respondent.

COLLINS, J.¹

Plaintiff appeals from a judgment entered upon the complaint and answer by order of the court below.

It appears from his complaint that the plaintiff was a retail grocer, a customer of the respondent, a corporation and dealer,

¹ BUCK, J., absent, took no part.

from whom he purchased milk to retail; that he purchased a quantity of this article, paying a certain sum per gallon, which in fact was skimmed milk, and was not marked as required by G. S. 1894, § 7003, which requires the cans or packages containing skimmed milk to be marked so that the contents may be known, and provides for the arrest and punishment, upon conviction, of any person who violates this law; that the milk so purchased was warranted by the defendant to be unskimmed milk; that plaintiff believed such representations, and relied upon them, and, so believing and relying, sold the milk to his customers; that, upon the complaint of the state dairy commissioner, he was arrested, charged with the offense of selling skimmed milk without first marking the can containing the same as required by law, and was convicted of the offense, sentenced to pay, and did pay, a fine of \$10.

There is no allegation in the complaint that the defendant knew that the article sold was skimmed milk, when making the sale or at any other time; and there is no allegation that plaintiff's customers, or any other persons, ever knew that the milk so sold was in fact skimmed, except as we may infer knowledge by reason of the prosecution. It is also alleged

"That by reason of said charge, imprisonment, arrest, trial, and conviction, * * * the said plaintiff sustained and suffered great mental distress and disgrace, and also great injury, loss, and damage in his business, to the amount of the sum of two thousand dollars," for which sum he demanded judgment.

The answer put in issue all of the material allegations found in the complaint, and the real question is whether a cause of action was stated in the last-mentioned pleading. We have said that there is no allegation that defendant knowingly sold skimmed milk to plaintiff, and it cannot be inferred from what is alleged that defendant intentionally violated the statute, or wilfully misrepresented the quality of the goods sold. It is not averred that plaintiff was in any manner injured in his business, or suffered damages in any way, except such as were caused by his arrest, conviction, and the payment of the fine. It is these damages for which he attempts to recover upon a bare allegation that the milk, sold to him upon a warranty that it was unskimmed, was in fact skimmed, and

therefore that there was a breach of contract, for which breach plaintiff is entitled to recover.

Upon the complaint in question, plaintiff was undoubtedly entitled to recover nominal damages, at least, for breach of the warranty; and, had he alleged the value of skimmed milk, he could have recovered the difference in value per gallon. But if counsel had even made the point that judgment on the pleadings was erroneously ordered, because the complaint was sufficient to authorize the recovery of nominal damages,—which was not done,—it is simply a suitable case for the application of the rule “*de minimis*.” The damages which plaintiff was entitled to recover under his complaint are to be determined by applying to the allegations the oft-cited rule laid down in *Hadley v. Baxendale*, 9 Exch. 341, thus:

“Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally (i. e. according to the usual course of things) from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”

The damages which plaintiff seeks to recover did not arise, according to the usual course of things, from a breach of the contract of warranty; and, if defendant innocently sold skimmed milk for unskimmed milk, it is perfectly plain that it could not have contemplated, when warranting the quality of the article, that the probable result of a breach of the contract would be plaintiff's arrest and conviction for the statutory offense with which he was charged. Neither of the parties (the defendant corporation, which sold, or plaintiff, who purchased) reasonably contemplated this special injury, and the conventional rule is applicable. Under the allegations of the complaint, nominal damages could have been recovered, but no other.

Judgment affirmed.

JOSEPH ROBITSHEK v. SWEDISH-AMERICAN NATIONAL BANK.

May 20, 1898.

Nos. 10,982—(85).

Insolvency—Allowance of Claim—Res Judicata.

Held, that the judgment entered in the court below in this proceeding was a bar to the granting of a certain petition made in behalf of this appellant, who was the respondent on a former appeal (68 Minn. 206).

Petition in the matter of the assignment of Jacob Skoll, insolvent, in the district court for Hennepin county. The substance of the petition is stated in the opinion. Upon the filing of the petition, September 3, 1897, the court made an order that the assignee of the insolvent and all persons interested show cause why the petition should not be granted. The Swedish-American Bank, a creditor of the insolvent, whose claim had been allowed, appeared and opposed the granting of the petition. On September 20, 1897, the court, Russell, J., made an order denying the petition and discharging the order to show cause. Subsequently the petitioner moved the court to vacate the last mentioned order, and on October 16, 1897, the court made an order denying the motion. From the order of September 20, 1897, as well as from the order of October 16, 1897, petitioner appealed. Affirmed.

A. D. Smith, for appellant.

A. Ueland, for respondent.

COLLINS, J.

This is the second appeal in this case, the opinion upon the first being reported in 68 Minn. 206, 71 N. W. 7. After the case was remanded to the court below, judgment was therein entered, in accordance with the conclusions of law, which judgment vacated the assignee's order allowing the claim, and, among other things, wholly rejected and disallowed the same, and further directed that the assignee pay no part of said claim out of the assets of said insolvent estate. The costs incurred by the appealing creditor, the Swedish-American National Bank, were duly taxed, allowed, and made a part of the judgment, and were afterwards paid by Robit-

shek. But in so far as the judgment related to his claim against the insolvent it has not been modified, vacated, or set aside. It is in full force and effect.

Some months afterward Robitshek petitioned the court below to set aside a stipulation mentioned in the former opinion, whereby an appeal taken by the original claimant had been dismissed, to substitute him as appellant in place of the original, and then to hear the appeal on the merits; or, if this relief could not be granted, that Robitshek be permitted to file his claim under the order of the court, and that the assignee be directed to allow or disallow the same, as he might deem proper, upon hearing the evidence. The present appeal is from an order denying the prayer of this petition and an order discharging the order to show cause.

After stating these facts, it is hardly necessary to go further, and to say that, if there was no other reason, the judgment before referred to effectually prevented the court from granting the relief mentioned in the petition, or any part of it. The moment that this judgment was entered it became operative as a bar, and it has remained so. No steps could be taken looking toward an allowance of the claim in question until the judgment was corrected, if improperly entered, or was set aside or vacated. We need not cite authorities to this proposition.

The order appealed from is affirmed.

HANS H. OLSON v. STATE BANK and Others.

May 20, 1898.

Nos. 11,056—(174).

Receiver—Duties—Legal Services when an Attorney.

The duties of a receiver for an insolvent are strictly administrative or executive; and he is not required, because he happens to be an attorney at law, to perform legal services in behalf of the estate.

Same—Allowance of Counsel Fees.

A receiver is under obligation to perform such duties in respect to the trust as any ordinarily competent business man is presumed to be capa-

ble of performing. It is only for services requiring special legal skill that he will be allowed counsel fees.

Same — Attorney as Receiver of Bank — Employing Counsel — Compensation.

A receiver of an insolvent banking corporation was appointed under an order which authorized him to employ necessary counsel, and provided for the payment of such counsel. The receiver was also an attorney at law. When making a partial report, he presented, among other accounts, one for services rendered by counsel employed by him in various legal matters connected with the estate. The court below wholly disallowed and rejected a number of items contained in this account, on the ground that "all of the services set forth in the attorney's bill, * * * in items disallowed, should either have been performed by the receiver, or if performed by another, at his request, should be paid for by him." *Held* error. It was not the duty of the receiver to perform all of the services said to have been rendered, or to pay for the same when performed by another.

Same — Reasonableness of Counsel Fees — Evidence — Judicial Notice.

When passing upon the reasonableness of charges made for counsel fees in such a case, the judges of the court can rightfully use their personal knowledge as to what has been done by the attorney, and can also take into consideration the character of legal services theretofore rendered by counsel, and the amount already allowed on account thereof. The correctness of such an account is not to be determined, as in ordinary cases, exclusively upon the evidence introduced on the hearing.

Same — Allowance of Trust Account — Appeal — Revision — Abuse of Discretion.

It is the duty of the courts, whether objections are or are not made by the creditors of a trust estate, to supervise and closely scrutinize the trust account. When this is done in accordance with the rules of law which govern, this court will not interfere or direct a revision, except where there has been an abuse of that sound discretion which, of necessity, rests with the lower courts.

Appeals by William J. Hahn, as receiver in the above entitled action, and John W. Arctander, as attorney of said receiver, from an order and supplemental order of the district court for Hennepin county, Smith, Simpson and Lancaster, JJ., made respectively on January 3, and January 13, 1898, on the hearing of the receiver's account and report, disallowing in part the claim and account of

said attorney, and more particularly the first, second, third, fourth, fifth, sixth, seventh, tenth, and eleventh items thereof. Reversed.

Exhibit C, referred to in the opinion, was as follows:

Bill of Attorney of Receiver for Services Rendered.

William J. Hahn,

**As Receiver in Case of Hans H. Olson v. The State Bank et al.,
To Jno. W. Arctander, Attorney, Dr.**

1896.

- | | | |
|---|---|----------|
| 1. Mch. 11. | To consultation with Receiver as to Rice payment and how affect judgment..... | \$ 5.00 |
| 2. Mch. 19. | To consultation with Receiver on Ames protest of payment and course to take as to costs..... | 5.00 |
| 3. | To examination of satisfaction Ames judgment and consultation on how to draw it so as not to affect other claims..... | 5.00 |
| 4. Mch. 21. | To consultation with Receiver with reference to transcripts of judgment to different counties | 5.00 |
| 5. Mch. 22 to May 30, and Aug. 5 to Sept. 10. | To investigating law and precedents on proceedings against foreign stockholders (over 3 months' time)..... | 1,500.00 |
| 6. Aug. 14. | To consultation with Receiver as to property held by Smith & Pillsbury | 5.00 |

1897.

- | | | |
|----------------------|---|----------|
| 7. Feb. 24. | To investigation of standing of H. M. Nowell and making application for compromising judgment against him for \$3,500.00 | 50.00 |
| 8. Mch. 1 to Apr. 1. | To examining law as to whether attachment would lie against a defendant after judgment against other defendants, and commencing attachment proceedings and bringing Catherine C. Chadbourn into court, and for bringing about payment by her of the full claim against her (\$8,000.00) | 1,000.00 |
| 9. May 15. | To paid Logan Breckenridge for investigating property of defendant Catherine C. Chadbourn in Olmsted Co., and for services with reference to attachment of same | 75.00 |
| 10. May. | To examination on proposal of release of judgment against three properties of de- | |

	defendant Tharalson, mortgaged for a consideration of \$150.00, and three consultations with Receiver on same.....	25.00
11. June, July and Aug.	To repeated efforts to secure payment from C. A. Smith, involving several interviews with Receiver, Smith and Paine's attorneys (whereby over \$1,400.00 obtained for Receiver)	25.00
12. Sept. 10-96 to July 15-97.	To examination of records of Register of Deeds in 30 counties for property of different defendants, especially Chadbourn's	300.00
13. Mch. 19-96 to Aug. 17-97.	To drawing and executing ten (10) satisfactions of judgment.	50.00
14. Aug. 25-97.	To paid Green & Wilson for examination of records of Hennepin Co., and furnishing abstracts of Chadbourn's transfers	50.00
15. Oct. 26, 27.	To trip to Chicago, consultation with attorneys there and negotiations with H. S. Durand, and bringing about settlement of his stock liability. (Expenses included.)	250.00
16. Nov. 3.	To application to court and order for leave to settle Durand claim for \$1,000... ..	25.00
17. Nov. 23.	To drawing release for Durand.....	10.00
		<hr/> \$3,385.00

Jno. W. Arctander, for appellants.

A receiver is not, at least without extra compensation, expected himself to perform other duties than those strictly executive, and for all services requiring legal skill he is to be allowed extra compensation out of the funds. *Farmers L. & T. Co. v. Central Ry. Co.*, 8 Fed. 60; *Henry v. Henry*, 103 Ala. 582; High, Rec. §§ 188, 805; *Lottimer v. Lord*, 4 E. D. Smith, 183; *Stuart v. Boulware*, 133 U. S. 78; 2 Perry, Trusts, § 912; *Adams v. Haskell*, 6 Cal. 475; *Abbott v. Downer*, 54 Iowa, 687; *Cake v. Woodbury*, 3 Dist. Col. App. 60; *Saulsbury v. Lady Ensley*, 110 Ala. 585; *Crumlish v. Shenandoah*, 40 W. Va. 627. The right of a receiver to employ counsel at the expense of the fund has been maintained even in cases in which the order appointing the receiver was reversed, and in which the counsel fees allowed were for services in attempts to maintain the

appointment of the receiver. *Kimmerle v. Dowagiac*, 105 Mich. 640; *Cowdrey v. Railroad Co.*, 1 Woods, 331; High, Rec. § 808; *State v. Butler*, 15 Lea (Tenn.) 113; *In re Bank of Niagara*, 6 Paige, 213. The attorney has no right to appeal, and to obtain justice it has been necessary for the receiver to take an appeal. *Stuart v. Boulware*, *supra*. The attorney cannot sue the receiver, but must look to the fund in court. *In re Anglo-Moravian*, L. R. 1 Ch. Div. 130.

Brooks & Hendrix, by leave of court, submitted a brief in behalf of Frank C. Brooks, who was appointed receiver upon the resignation of appellant receiver after the appeals were perfected.

The appeals should be dismissed. The attorney had no right of appeal. An allowance of counsel fees on behalf of a receiver is made to the receiver and not to the counsel. *Stuart v. Boulware*, 133 U. S. 78. The appeal on the part of Hahn was taken by him "as receiver." In that capacity, at least, he has not been aggrieved. As receiver, he cannot complain that the funds in his hands have not been diminished. These orders are not "final," within the meaning of G. S. 1894, § 6140. Appellant Hahn was allowed all he asked for. The court below found that the aggregate sum allowed for the receiver and the attorney was an adequate compensation for all services performed by both; and the sum allowed exceeded in the aggregate all sums claimed or asked for by the receiver and his attorney. No facts are disclosed from which it can be inferred that the receiver ever incurred any personal liability to his attorney on account of the services rendered by the latter. *Hayes v. Crane*, 48 Minn. 39. These were discretionary orders. The judges of the court below could rightfully use their personal knowledge of the facts in passing upon the reasonableness of the attorney's charges. *In re State Bank*, 57 Minn. 361. The necessity for employment of counsel must be clearly shown. *Gluck & Becker*, Rec. § 111; *Terry v. Martin*, 7 N. M. 54; *Henry v. Henry*, 103 Ala. 582; *Saulsbury v. Lady Ensley*, 110 Ala. 585. This court should not fix the allowance. The court below did not undertake to find specifically the value of each item of the alleged services of the attorney, charges for which were disallowed. And had it done so, it would not have

been required to find the value to be that testified to, though the testimony offered and received was wholly uncontradicted. *Stevens v. City of Minneapolis*, 42 Minn. 136; *Olson v. Gjertsen*, 42 Minn. 407; *Harrow v. St. Paul & D. R. Co.*, 43 Minn. 71; *Papooshek v. Winona & St. P. R. Co.*, 44 Minn. 195; *Aldrich v. Grand Rapids C. Co.*, 61 Minn. 531; *In re Penner Co.*, 93 Wis. 655. Of necessity, this rule applies when, as in this case, the trial court bases its decision in part upon its personal knowledge of facts not proven or shown by the evidence received. And if all the evidence and facts upon which the trial court based its conclusions were before this court, they would not determine a question of fact. *Jordan v. Secombe*, 33 Minn. 220; *Warner v. Foote*, 40 Minn. 176; *Williams v. Schembri*, 44 Minn. 250; *Miller v. Chatterton*, 46 Minn. 338; *Smith v. Kipp*, 49 Minn. 119. It appears affirmatively from the record that the orders are neither erroneous nor unjust. It was the duty of the court, whether objections were made by the creditors or not, to supervise the management of the estate and to examine the accounts of the trust. *Branch v. American*, 57 Kan. 282. The very fact that the services for which the \$1,500 was charged were fruitless was a sufficient justification for the orders complained of. *Beach*, Rec. § 754; *Kerr*, Rec. 244. This court has never increased an allowance made below. *In re Shotwell*, 49 Minn. 171; *In re State Bank*, *supra*.

COLLINS, J.

Appeals taken from orders, original and supplemental, made by the district court when passing upon a partial report and account of a receiver of a banking corporation, which report and account included an attorney's claim for legal services rendered and for disbursements made, a part of said claim being rejected and disallowed.

The claim in question was itemized, quite in detail, each item being numbered, and is known in the paper book as "Exhibit C." The items numbered from 1 to 7, inclusive, and items 10 and 11, were wholly disallowed, for reasons hereinafter stated. Items 8, 9, 12, 14 and 15, aggregating the sum of \$1,675, were allowed in full, while on account of items 13, 16, and 17, \$25 was allowed; thus

making a total allowance of \$1,700. Several of the rejected items were charges for advice to the receiver in respect to legal matters. Some were for drawing legal documents, and one, for quite a large sum of money, was for "investigating law and precedents on proceedings against foreign stockholders" for over three months.

This entire exhibit was supplemented by oral testimony in respect to each item, the nature of the services, the length of time consumed in the work, and the value thereof, all of which testimony stood uncontradicted. And the reasons which seem to have actuated the court when refusing to allow a number of the items constituting the attorney's account are thus stated in the supplemental order:

"All of the services set forth in the attorney's bill (Exhibit C), in items disallowed, should either have been performed by the receiver, or if performed by another, at his request, should be paid for by him out of the said percentage,"—referring to a percentage agreed to by the receiver, at the time of his appointment, as compensation for his services in making certain collections.

It appears from this excerpt that it was the opinion of the court that the duties of a receiver included those ordinarily performed by an attorney at law, and these duties he was expected to perform himself, if qualified, or, if not, he was to employ an attorney at his own expense. If, then, the receiver is an attorney, it becomes his duty to perform legal services of the character described in the disallowed items, for which he is not to be paid. And if he is not an attorney, and for that reason is compelled to take counsel and advice of a man of that profession, or if it becomes necessary to have the authorities examined upon some question of law by a properly qualified person, the receiver must pay the fees himself for such examination, out of the percentage stipulated as his compensation for collecting claims due the estate.

We do not understand this to be the law in any case, and certainly it ought not to be where, as in the present, the order of appointment specifically provided for the employment of such counsel as the receiver deemed necessary for the management of all actions, suits, or other affairs as had arisen or might arise in the execution of the trust, and also for the purpose of advising such receiver in

the performance of his duties, and further provided for the payment of proper counsel fees for such services.

Again, the receiver, if he is an attorney, is not required himself to perform any other duties than those strictly administrative or executive, or, if he does, he is entitled to additional compensation for his services. *Farmers L. & T. Co. v. Central Ry. Co.*, 8 Fed. 60. And when employing counsel the receiver must also remember that it is his duty to perform such duties as any ordinarily competent business man is presumed to be capable of performing. These are his duties, and he is paid therefor. It is only for services requiring special legal skill that he will be allowed counsel fees. *Henry v. Henry*, 103 Ala. 582, 15 South. 916. See, also, *Stuart v. Boulware*, 133 U. S. 78, 10 Sup. Ct. 242; *Adams v. Haskell*, 6 Cal. 475.

There must be a real occasion for the employment of counsel, and, if there is no necessity shown for this employment, the court will not ordinarily allow his fees as a necessary expense. We cannot agree with the court below that all of the services mentioned in the disallowed items should have been performed by the receiver, for in some instances, at least, the work required the investigation and advice of counsel,—the services of an attorney at law. Much that was done could not have been done by the ordinary business man, nor was it either administrative or executive. It was not incumbent upon the receiver to perform these duties simply because he happened to be an attorney, nor would it have been his duty, had he been a layman, to secure counsel at his own expense to examine into some of the matters in question, that he might be advised and the estate properly protected.

The real difficulty with the position taken by the judges who refused to allow any of these items is in holding, in effect, that legal services were required of the receiver as a part of his duties, and that if the services were not performed by him when so required, but were performed by counsel, the obligation was upon the receiver himself to pay for the services.

We agree with counsel for the present receiver that, when passing upon the reasonableness of the attorney's charges, the judges could rightfully use their personal knowledge of what had been done in respect to the estate by the attorney, and they could also

take into consideration the character of legal services theretofore rendered by counsel, and the amount already allowed on account of the same. The correctness of such an account is not to be determined, as in ordinary cases, exclusively upon the evidence introduced on the hearing, for the judges have personal knowledge of the proceedings, of what has been done, and of the general nature and extent of the services alleged to have been rendered, and this knowledge may properly be used when determining what would be fair compensation for the attorney's services. This is the rule laid down when considering an assignee's account (*In re State Bank*, 57 Minn. 361, 59 N. W. 315), and is strictly in point here.

And, further, we agree with counsel that it is always the duty of the court, whether objections are or are not made by the creditors of a trust estate, to supervise and scrutinize closely the trust account. When this is done in accordance with the rules of law hereinbefore stated, this court will not interfere or direct a revision, except where there has been an abuse of that sound discretion which, of necessity, rests with the court below.

Assuming that the order appealed from would be reversed, we are asked by counsel to fix and determine in this court the amount which should be allowed on account of the services mentioned in the rejected items; and no objection thereto seems to be made by opposing counsel. But it is not within the power of this court, in the first instance, to fix the fees or compensation to be allowed to trustees for their personal services, or for the services of counsel employed by them, in proceedings pending in the district court, and over which such courts have original jurisdiction.

The orders appealed from in so far as they disallowed the first, second, third, fourth, fifth, sixth, seventh, tenth and eleventh items of said partial report and account, are reversed, and the cause is remanded for further proceedings in accordance with the views herein expressed.

JOHN BRUGGEMANN v. JOHN WAGENER.

May 20, 1898.

Nos. 11,193—(62).

Conveyance in Fraud of Creditors—No Change of Possession—Fraud a Question for Jury.

Upon the evidence produced on the trial of this cause it cannot be held, as a matter of law, that a sale and transfer of personal property therein involved was fraudulent and void as to the vendor's creditors.

Action by John Bruggemann, as special administrator of the estate of Martin Bruggemann, deceased, in the district court for Ramsey county. From an order, Brill, J., denying a motion for a new trial, defendant appealed. Affirmed.

George R. Robinson and Chas. J. Berryhill, for appellant.

John V. I. Dodd, for respondent.

COLLINS, J.

Action in claim and delivery against a sheriff who had levied upon the property in question as belonging to one Minea, the judgment debtor named in an execution placed in the sheriff's hands for service.

The facts admitted or established on the trial were that Minea was in the grocery business, and, finding himself insolvent, entered into a composition agreement with all of his then existing creditors except Robinson, the judgment creditor, and one Bruggemann, to whom he owed a large sum of money, whereby he agreed to pay, and the creditors agreed to accept, 30 cents on the dollar in full settlement of their claims. To raise the money with which to pay his creditors, Minea sold his stock of goods and store fixtures to Bruggemann, since deceased, delivering to him a bill of sale of the property of date March 15, 1895. On the same day a written agreement was entered into between Minea and Bruggemann whereby the former was constituted manager of the business at a stipulated salary of \$100 per month, and at the end of one year the excess of profits over and above \$1,200 was to be equally divided

between said persons. At the end of the year this agreement was renewed and continued for two years.

The levy was made on a part of the goods and fixtures in January, 1897. Minea was then, and had been, in possession, claiming to be the manager of the store, from the day the bill of sale was made. This instrument was filed at once in the office of the clerk of the city in which the parties resided and the goods were. Bruggemann furnished the money needed to pay the creditors in accordance with the terms of the agreement, and it was not shown or suggested that the sum stipulated as a consideration for the sale was inadequate.

At this time Robinson had brought an action against a firm of which Minea was a member, but with the business of which he was not actively connected, to recover about \$112, which he claimed was due on account of the rent of a building owned by him and occupied by the firm. It is admitted that rent had been paid up to the time the firm moved out, and that the claim was for rent which Robinson insisted had subsequently accrued. From the evidence in the case it is apparent that Minea had good reason to believe that the firm was not indebted on account of rent, and that Robinson could not recover. The action mentioned was afterwards dismissed, and was then recommenced, and a judgment in Robinson's favor was duly rendered for about \$190. The execution before mentioned was issued upon said judgment.

When the evidence was all in, counsel for defendant sheriff moved the court to direct the jury to return a verdict in favor of their client, and the principal question under the assignments of error arises out of the refusal to so direct. In its charge the court submitted the bona fides of the sale to the jury in a clear and impartial manner, no exception being taken, and plaintiff had a verdict. This appeal is from an order denying defendant's motion for a new trial.

Counsel for defendant sheriff contend—taking together the bill of sale and the agreement (a part of the same transaction) by which Minea was made manager of the business, and the evidence, from which it appears indisputably that there was no actual change of possession, but that Minea remained in sole charge—that the al-

leged sale and transfer from Minea to Bruggemann was fraudulent and void as to all of Minea's creditors who did not assent to it, and especially as to Robinson, who was then one of his creditors, and afterwards obtained a judgment against him as a member of the firm before mentioned. We cannot agree with counsel, but, upon all of the facts, are of the opinion that the question of fraud was properly submitted to the jury.

The sale to Bruggemann was made for the express purpose of paying all of the creditors except Bruggemann himself and Robinson, and, as before stated, Minea had reason to believe that the firm did not owe any rent whatsoever to Robinson. His partner, the active man of the firm, assured Minea that Robinson agreed that no further claim should be made for rent when payment was made for the time the building was actually occupied. The amount claimed to be due was not large, and was in controversy. If Bruggemann knew anything about the affair, we are justified in saying that his knowledge was simply that possessed by Minea; and the transaction was in no way concealed, but was open and above board. Minea had a right to sell his stock of goods, and Bruggemann had the right to purchase, there being no fraudulent intent on the part of either; and Bruggemann had the right to employ Minea as manager, providing it was no part of a scheme to defraud Minea's creditors. While there may have been suspicious circumstances surrounding the affair, tending to indicate a colorable transaction and a fraudulent intent to defeat the collection of Robinson's claim, we cannot so hold as a matter of law.

Order affirmed.

EDWIN C. FITHIAN v. ANNA M. WEIDENBORNER.

May 20, 1898.

Nos. 11,201—(218).

Work and Labor—Findings Sustained.

Findings of fact *held* to be justified by the evidence.

Appeal by defendant from an order of the district court for Hen-

nepin county, Tarbox, J., denying a motion for a new trial. Affirmed.

John E. Tappan, for appellant.

Walter C. Tiffany, for respondent.

PER CURIAM.

Action brought to recover a balance claimed to be due on account of work and labor performed by plaintiff, as a clerk, for defendant, at her request. The trial was by the court without a jury, and its conclusion of law, upon the facts found, was that plaintiff was entitled to judgment for \$127.97, with interest. There may have been an error of about \$7 in plaintiff's favor in the computation made by the court, but otherwise the findings were justified by the evidence.

No effort was made below to correct this error, and the order denying a new trial stands affirmed.

C. E. DICKERMAN v. CITY OF ST. PAUL.

May 23, 1898.

Nos. 10,977—(113).

Appeal—City of St. Paul—From Justice of Peace to Municipal Court.

An appeal lies from the judgment of a justice of the peace in the city of St. Paul, in a civil action against the city, to the municipal court of the city.

Appeal by defendant from a judgment of the municipal court of St. Paul, entered pursuant to the order of Orr, J. Reversed.

James E. Markham and *Hermon W. Phillips*, for appellant.

A. E. Bowe, for respondent.

START, C. J.

The plaintiff recovered a judgment against the defendant city in a justice court of the city of St. Paul. The defendant appealed to the municipal court of the city, which dismissed its appeal, and it then appealed to this court from the judgment of the municipal court dismissing its appeal. The question presented by the record

for our decision is: Does an appeal lie from the judgment of a justice of the peace in the city of St. Paul to the municipal court of the city in a civil action against the city? We answer the question in the affirmative.

Sp. Laws 1881, c. 407, provides as follows:

"All appeals from judgments of justices of the peace in the city of St. Paul shall be taken to the municipal court of the said city, and said municipal court shall have the same powers in such cases now possessed by the district court, and all laws applicable to appeals to the district court are hereby made applicable to appeals to said municipal court."

At the time this statute was enacted, the jurisdiction of the municipal court was limited to \$200, and to this extent it then had original jurisdiction in a civil action in which the city was a party. Sp. Laws 1889, c. 351, extended the jurisdiction of the municipal court to \$500, but expressly provided that the jurisdiction of the court should not extend to any civil action against the city of St. Paul. Section 28 of the same act expressly provides for appeals from the judgment of justices of the peace to the municipal court, in these words:

"All appeals from judgments of justices of the peace in the city of Saint Paul shall be taken to this court, and this court shall have the same powers in such cases now possessed by the district courts of this state; and all laws applicable to appeals to the district court are made applicable to this court."

The language of this section 28 is general, and is broad enough to include appeals from justice courts where the city is a party defendant. There is apparently force in the suggestion of respondent's counsel to the effect that, the law having deprived the municipal court of original jurisdiction in cases against the city, it would be inconsistent to invest it with appellate jurisdiction of the same class of cases. We cannot, however, read an exception into section 28, to the effect that it shall not apply to appeals from a justice of the peace in civil actions against the city, unless such is the clear intention of legislature. The legislation under consideration is somewhat crude, and the language used to express the legislative intent is not aptly chosen; but construing the statute as

a whole, and with reference to its history, the intention is reasonably clear.

Prior to the act of 1889, the civil jurisdiction of the court was limited to \$200; and to this extent it had original jurisdiction and appellate jurisdiction in all appeals from judgments of justices of the peace in the city, without reference to the parties to the action. But, when the limit of the jurisdiction of the court was extended from \$200 to \$500 by the act of 1889, a provision was inserted, for the benefit of the city, to the effect that the court should not have jurisdiction of any civil action against the city. This was done for the obvious reason that the city was unwilling that the court should have jurisdiction of cases against it involving \$500. Therefore the original jurisdiction of the court in cases against the city was taken away, and its appellate jurisdiction as it had previously existed continued. There was no reason for taking away this appellate jurisdiction, because in no case could the amount involved exceed \$100. It cannot be presumed that the legislature intended to make any change in the existing law beyond what was expressly declared in the statute; much less can it be presumed, in the absence of any express provision requiring it, that it was intended by the act of 1889 to deprive the city of all right of appeal from judgments against it in justice court. Our conclusion is that section 28 gives the right of appeal from all judgments of justices of the peace in the city of St. Paul to the municipal court, and that judgments against the city are not excepted from such appellate jurisdiction.

The judgment appealed from is reversed, and the case remanded to the municipal court, with directions to entertain the appeal, and hear the case on its merits. No statutory costs will be allowed the appellant in this court, as the case was set for oral argument, contrary to the rule of the court.

JULIA SELKIRK v. P. O. STEPHENS and Others.

May 23, 1898.

Nos. 11,003—(130).

72	335
177	519
77	620
77	521
72	335
82	331

Game Belonging to Indian—White Earth Reservation—Seizure Away from Reservation.

The plaintiff is an Indian, and a licensed trader on White Earth reservation. She purchased on the reservation a quantity of game killed thereon by tribal Indians, and transported it by wagon off the reservation to the nearest railway station, and there delivered it to a carrier, to be shipped out of the state. It was seized and confiscated while in possession of the carrier by the defendants, acting as game warden and game and fish commissioners of the state. *Held*, that the defendants' acts were legal.

Appeal by plaintiff from an order of the district court for Becker county, Searle, J., sustaining a demurrer to the complaint. Affirmed.

M. L. Countryman, for appellant.

T. E. Byrnes, for respondents.

START, C. J.

The material facts alleged in the complaint are: The plaintiff is an Indian, and an actual inhabitant of White Earth Indian reservation, situated within the limits of this state, and a trader thereon under a license from the United States. Prior to November 19, 1896, as such trader, she purchased upon the reservation, from Indians residing thereon who were members of the tribes located thereon, a quantity of game birds which were killed thereon by such Indians, consisting of prairie chickens and partridges, of the value of \$485. On the day named the plaintiff attempted to ship the birds out of the state, and did transport them from the reservation by wagon to Detroit, the nearest railway station, and there delivered them to the express company for carriage out of the state to eastern states, to be there sold by her agents for her account. After the birds had been delivered to the express company, and while in its possession and in process of shipment out of the state, the defendant Stephens, as game warden of the state, acting under

the authority of his co-defendants, who constitute the board of game and fish commissioners of the state of Minnesota, seized the birds, and delivered them to the board, and thereupon the defendants, claiming to act as such officers, sold the birds and paid the proceeds thereof into the treasury of the state. The defendants interposed a general demurrer to the complaint, which was sustained, and the plaintiff appealed from the order sustaining it.

At the time of this attempted shipment of the birds out of the state the statute of the state for the preservation of game contained, with other provisions, the following:

"No person at any time shall catch, take or kill, or have in possession or under control any of the birds, animals or fish caught, taken or killed in this state * * * with intent to ship the same beyond the limits of this state, or with intent to allow or aid in their shipment out of this state, or shall ship or intentionally allow or aid in their shipment out of this state. * * *" G. S. 1894, § 2170.

"It shall be the duty of all the members of the board of game and fish commissioners, all game wardens, sheriffs and their deputies, constables and police officers of this state at any and all times, to seize and take possession of any and all birds, animals or fish which have been caught, taken or killed at a time, in a manner, or for a purpose, or had in possession or under control, or have been shipped contrary to any provision of this act. Such seizure may be made without a warrant." G. S. 1894, § 2177.

This statute makes it unlawful to ship game out of the state at any time, and authorizes its seizure and confiscation if the statute is violated. The statute is constitutional. *State v. Northern Pac. Exp. Co.*, 58 Minn. 403, 59 N. W. 1100; *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600. It necessarily follows that the seizure in question was lawful, and that the complaint does not state facts constituting a cause of action, unless the fact that the game was killed on the reservation by Indians exempts it from seizure at a place within the state, and off the reservation, while it is in possession of a carrier for shipment out of the state.

The question for our decision is not whether our game laws may be enforced against Indians, so that they may be prosecuted and personally punished for its violation on the reservation. Were this the question, it would have to be answered in favor of the

Indians, for this court in the case of *State v. Campbell*, 53 Minn. 354, 55 N. W. 553, rightly held that tribal Indians on this reservation are not subject to the criminal laws of the state. But the sole question here is the legal status of game found off the reservation and in the hands of the carrier for shipment out of the state, which was killed on the reservation by Indians. The answer to this question involves a determination of the extent of the jurisdiction of the state over this reservation.

The White Earth reservation is not unceded Indian country. It was such prior to 1855, but by an act of congress approved December 19, 1854 (10 Stat. 598), the president of the United States was authorized to enter into negotiations with the Chippewa Indians for the extinguishment of their title to all lands owned and claimed by them in the territory of Minnesota; the treaties so to be made to contain a provision that:

"The laws of the United States and the territory of Minnesota shall be extended over the Chippewa territory in Minnesota whenever the same may be ceded, and the same shall cease to be 'Indian country,' except that the lands reserved to said Indians, or other property owned by them, shall be exempt from taxation and execution; and that the act passed 30th June, 1834, 'to regulate trade and intercourse with the Indian tribes,' etc., be inoperative over the said ceded territory, except the 20th section, which prohibits the introduction and sale of spirituous liquors to Indians." 10 Stat. at 599.

Such a treaty was made February 22, 1855, and proclaimed April 7, 1855, whereby the Indians ceded to the United States all right, title, and interest of whatsoever nature which they had in and to a large tract of land therein described, and which included all of the land now known as "White Earth Reservation." *Rev. Indian Treaties* (1873) 263. This treaty reserved a number of tracts of land which were set apart for the homes of the Indians, but there was no reservation of the right of the Indians to hunt and fish on and over the ceded territory. None of these reservations included any lands within the limits of White Earth reservation. A portion of the land now included in the last-named reservation was set apart for the future home of the Indians by treaty of May 7, 1864, proclaimed March 20, 1865; and by treaty of March 19,

1867, proclaimed April 18, 1867, there were set apart for the use of the Indians, in order to provide them with a suitable farming region, 36 townships of land, to include White Earth Lake and Rice Lake. Rev. Indian Treaties, 259, 271. Under the provisions of the treaty of 1867, what has since been known as White Earth reservation was established.

The legal effect of the treaty of February 22, 1855, was that the lands now embraced within the limits of White Earth reservation became public lands of the United States, and that every right of the Indians therein became absolutely extinguished. The laws of the then territory of Minnesota became operative over the whole territorial limits of the present reservation. When the territory of Minnesota became a state in 1858, the jurisdiction of the state was just as complete and absolute over the lands now included in the reservation in question as it was over any other part of the state, except as to the sale of spirituous liquors to the Indians. The state has never ceded or relinquished any part of this jurisdiction. Such jurisdiction was modified by the subsequent setting apart of the reservation for the use of the tribal Indians, under the control of the general government, to the extent only that the state cannot tax the property of the Indians, or interfere with the control of such Indians while on this reservation, or punish them for acts committed thereon in violation of its laws.

This limitation of the power of the state does not arise from the fact that the laws of the state are not operative upon this reservation, but it grows out of the personal relations of such Indians to the general government. They are its wards, and under its guardianship and control, and the state may not interfere with or impair the efficacy of such guardianship. Subject to this limitation, all of the general laws of the state, including its game laws, are in force in every part of White Earth reservation. A white man may be punished by the state for a crime committed thereon, but a tribal Indian may not be. *State v. Campbell, supra.*

After the Indian title to the land within this reservation was extinguished, and before it was set apart for the Indians in 1867, the state owned the game thereon in trust for the whole people of the state, with the right and duty to make and enforce such laws

as it deemed necessary for its protection and beneficial use. The state has never parted with this ownership and trust. It is, therefore, not true, as a legal proposition, whatever may be the case ethically, that the Indians own the game on this reservation, for it belongs to the state, and its game laws are operative upon this reservation. But its remedies for enforcing them are imperfect, in that it cannot punish Indians for violating such laws on the reservation. A white man on the reservation may be so punished.

It is unnecessary to, and we do not, decide whether the state may or may not interfere with game which is unlawfully in the possession of Indians on the reservation. But we do hold that when, as in this case, game is once off this reservation, and in the possession of any person or corporation in violation of the law, it may be seized and confiscated by the proper officers of the state without reference to where or by whom it was killed.

It is immaterial whether the shipment of the game in question commenced on the reservation or off it, at Detroit, for, if it commenced on the reservation, no question of interstate commerce can arise, for the reservation is a part of the state, and it has jurisdiction over it, except as we have stated.

Order affirmed.

M. A. HINTON and Another v. EASTERN RAILWAY COMPANY OF MINNESOTA.

May 23, 1898.

Nos. 11,036—(98).

Bill of Lading—Exception—Burden of Proof—Negligence.

Held (following *Shea v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 63 Minn. 228), that the burden of proof is upon a common carrier, who claims that by reason of an exception in the bill of lading he is not liable for the loss sued for, to show, not only that the cause of the loss was within the exception, but also that there was no negligence on his part.

Carrier—Injury to Merchandise—Due Care—Charge to Jury.

This was an action against a carrier for damages for injury to merchandise while in its possession. *Held*, that the trial court rightly re-

fused to instruct the jury that the measure of the defendant's duty was that which it was usual and customary for other carriers to do under like circumstances.

Same—Verdict—Damages not Excessive.

Evidence considered, and *held*, that it sustains the verdict, and that the damages awarded are not excessive.

Appeal by defendant from an order of the district court for Hennepin county, Jamison, J., denying an alternative motion for judgment notwithstanding a verdict for \$6,600 or for a new trial. Affirmed.

W. E. Dodge, for appellant.

The rule that common carriers are bound to carry and deliver goods safely as against all losses except those occasioned by the act of God or the public enemies does not render them liable for goods that perish or are deteriorated by reason of their own inherent liability to decay or to injury from heat and cold. 2 Rorer, R. 1245; *Swetland v. Boston*, 102 Mass. 276; *Vail v. Pacific*, 63 Mo. 230; *Ray*, Neg. Imp. Duties (Freight) 309. There is no presumption that the negligence of the carrier co-operated with the cold to cause the injury, since the cold itself, without such co-operation, would cause it, and the parties evidently contemplated that it might cause it. *Wolf v. American*, 43 Mo. 421. It is only in cases where the fact of the injury raises a presumption of negligence, that the rule stated in *Shea v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 63 Minn. 228, is applicable. If it is more reasonable to believe, or as reasonable to believe, from circumstantial evidence, that the accident may have happened as the result of some other cause than that assigned, i. e. defendant's negligence, there can be no recovery, since the question must not be left to mere conjecture. *Orth v. St. Paul, M. & M. Ry. Co.*, 47 Minn. 384; 1 *Bailey, Mast. Liab.* 503-508; *Philadelphia v. Schertle*, 97 Pa. St. 450.

Stiles & Stiles, for respondent.

START, C. J.

Action to recover damages which the plaintiffs claim to have sustained on account of the freezing of 6,600 barrels of apples

while they were in the possession of the defendant as a common carrier, as the result of its negligence. Verdict for the plaintiffs for \$6,600. The defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict, or for a new trial.

1. The defendant's first claim is that neither the allegations of the complaint, nor the facts proven on the trial, show or tend to show that the injury to the apples was caused by its negligence. The complaint charges defendant's negligence in these words:

"Defendant failed and neglected to use reasonable and ordinary care in the handling and transportation of said apples as a common carrier, but, on the contrary, so negligently and carelessly conducted itself that, while said apples were in its custody as such common carrier, the same became frozen and thereby depreciated in value, to the damage and," etc.

This is a sufficient allegation of appellant's negligence. *Clark v. Chicago, M. & St. P. Ry. Co.*, 28 Minn. 69, 9 N. W. 75; *Keating v. Brown*, 30 Minn. 9, 13 N. W. 909; *Rolseth v. Smith*, 38 Minn. 14, 35 N. W. 565.

The apples were delivered to the Rome, Watertown & Ogdensburg Railroad Company, at Hamlin, New York, to be carried over its line to Buffalo, thence by the Northern Steamship Company's line to West Superior, and thence over the defendant's railway to their destination, Minneapolis. These several lines constituted a continuous line from Hamlin to Minneapolis. Bills of lading were delivered to the plaintiffs as the shipments were made, which the trial court, in its instructions to the jury, held to have been made and accepted in consideration of a lower freight rate, and to contain a valid agreement to the effect that neither the initial nor any connecting carrier should be liable for loss or damage to the apples so shipped which was caused by changes in the weather, heat, frost, or decay, and that, in case of any claim for damages, it should be made in writing to the agent at the point of delivery, promptly, and within 30 days after the arrival and delivery of the property. The instruction was not excepted to by either party.

The plaintiffs offered ample evidence on the trial to establish the fact that the apples were properly packed and delivered to the

initial carrier in good condition, and that when they were delivered to the plaintiffs by the defendant at Minneapolis, the place of their destination, they were in a damaged condition, having been frozen in transit. The defendant claims that the fact so established did not shift the burden upon it, as the last carrier, to show that it was not negligent in the premises. Its claim in this respect is this:

"The loss having been brought within the terms of the exception, since it is alleged that the sole damage was caused by frost, it would seem to follow that proof of the mere fact of freezing does not raise the presumption of defendant's negligence, since the parties clearly contemplated that such loss might occur without negligence."

This precise point was directly involved, argued, and decided in the case of *Shea v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 63 Minn. 228, 65 N. W. 458, which was an action to recover for injury to a quantity of oranges by frost while in transit. The bills of lading in that case exempted the carrier from liability for 'damage by frost or heat, and this court held that it was not sufficient for the carrier to show that the loss was within the terms of the exception, but it must also show that there was on its part no negligence in the premises. Upon principle and authority, the *Shea* case was correctly decided, and we adhere to it.

It is further claimed by defendant that it overcame the presumption of negligence on its part by showing that the apples must have been frozen when they were delivered to it at West Superior, and that from the time it received them until they were delivered to the plaintiffs it did all that a prudent and skillful carrier could have done under the circumstances to prevent the injury. There was evidence given on the trial tending to support this contention, but it was not conclusive; and, upon the whole evidence, our conclusion is that the question of the defendant's negligence was one of fact for the jury, and that the verdict is sustained by the evidence.

2. The defendant assigns as error the rulings of the trial court in admitting evidence tending to show that the defendant's Minneapolis agent solicited the shipment of the apples over its and the other connecting lines, and that he was advised when the ship-

ments would commence, and, approximately, of the number of car loads. This evidence was proper in rebuttal, as the defendant gave evidence tending to show that its agent at West Superior had no notice of the shipment until within 48 hours of the arrival there of a cargo of 24 car loads of the apples on a steamer, and that the defendant had only a limited time in which to prepare to receive, care for, and transport such an unusually large shipment of apples at that season of the year, the time being November 29, and the weather very cold.

The plaintiffs were also permitted, over the objections of the defendant, to give evidence tending to show that the freight rate actually agreed upon by the parties was less than the rate actually charged. The purpose of this evidence was to show that there was no consideration for the contract in the bills of lading for a limited liability, but the court expressly charged the jury that there was a consideration for such contract. Therefore the admission of the evidence was harmless error, if any.

3. The defendant further claims that written notice of plaintiffs' claim was not given to the agent at the point of delivery within 30 days after the delivery of the apples, as required by the bills of lading. The evidence shows that such notice was made and served upon Mr. Brann, the agent of the defendant at the point of delivery (Minneapolis), who was also agent for the Great Northern Railway Company at that point, and that the last named company actually made the delivery. The notice, however, was directed to Mr. Brann as agent of the Great Northern Railway Company, and to that company. The notice was a substantial compliance with the condition of the bills of lading.

4. The defendant requested, and the trial court refused to give, this instruction:

"You must necessarily, as jurors, determine the responsibility of individual conduct; but you cannot be allowed to set up a standard of conduct which shall, in effect, dictate the custom or control the business of the community. The measure of the defendant's duty is, what was it usual and customary for other carriers in this part of the country to do under similar circumstances?"

This was properly refused, for it assumes as a matter of law that,

if the defendant did in the premises what was usual and customary for other carriers to do, it was not guilty of negligence. Proof of the general custom of other carriers under like circumstances was competent, as tending to show that the defendant was not negligent; but such evidence was not conclusive, even if undisputed. *O'Malley v. St. Paul, M. & M. Ry. Co.*, 43 Minn. 289, 45 N. W. 440; *Flanders v. Chicago, St. P., M. & O. Ry. Co.*, 51 Minn. 193, 53 N. W. 544.

5. Lastly, the defendant claims that the damages awarded are excessive. The evidence on the part of the plaintiffs fairly tends to show that the apples, at the initial point of delivery, were of the value of one dollar per barrel, and that when they were received at Minneapolis the average value of the entire lot was less than the freight paid thereon by them, and that this depreciation in value was due to the fact that the apples had been frozen. This evidence sustains the finding of the jury that the damages were \$6,600, or an average of one dollar per barrel.

Order affirmed.

NICHOLS & SHEPARD COMPANY v. ANNA WIEDEMANN.

May 23, 1898.

Nos. 11,070—(91).

Sale—Warranty—Divisibility—Finding Sustained.

Evidence considered, and *held*, that it sustains the finding of the trial court to the effect that the defendant complied with the conditions of the warranty of a threshing outfit purchased of the plaintiff.

Offer of Evidence—Materiality—Scofield v. Walrath, 35 Minn. 356, Followed.

Rule in *Scofield v. Walrath*, 35 Minn. 356, and previous cases, that evidence offered must be made to appear material, followed and applied.

Counterclaim—Relief Limited by Answer.

The defendant gave her promissory notes and certain old machinery at the agreed price of \$758 for the purchase price of new machinery. In her answer she claimed a rescission of the sale, and alleged the value of the old machinery to be \$600, for which she asked judgment, and for a

cancellation of the notes. *Held*, that her money recovery was limited to \$600.

Appeal by plaintiff from an order of the district court for Clay county, Baxter, J., denying a motion for a new trial. Affirmed on conditions.

F. H. Peterson and *A. C. Kingman*, for appellant.

C. A. Nye, for respondent.

START, C. J.

This action was brought to foreclose a chattel mortgage given by the defendant to the plaintiff upon a grain-threshing outfit, consisting of steam engine and separator with appliances and attachments, to secure the payment of three promissory notes given for a part of the purchase price of the machinery and amounting in the aggregate to \$2,100.

The answer admitted the making of the notes and mortgage, and alleged that the defendant purchased the machinery from the plaintiff for the agreed price of \$2,700, and in part payment she turned over to it a second-hand threshing outfit at the agreed price of \$600, its reasonable value, and gave the mortgage and notes for the balance thereof; that the machinery was warranted; that there was a breach thereof; and that she returned the machinery to the plaintiff at the place she received it, pursuant to the conditions of the warranty. The answer also contained allegations as to her damages by reason of the warranty, and prayed judgment that the notes and mortgage be delivered to the defendant, and that she recover the sum of \$600 paid on the purchase of the machinery; also special damages in the sum of \$2,000.

The findings of the trial court included the findings of the jury on special issues, and, so far as here material, were to the effect that there was a breach of the warranty, a rescission of the sale upon the defendant's part, and return of the machinery to the plaintiff; and its conclusions of law were that the plaintiff was not entitled to recover, but that the defendant was entitled to judgment against it for \$758 paid on the purchase price, with interest. The plaintiff appeals from an order denying its motion for a new trial.

1. The plaintiff's important assignments of error may be con-

sidered together. They involve the question whether the evidence sustains the finding of the trial court to the effect that the defendant complied with all the conditions of the warranty.

The contract of warranty was in writing, and contained, among others, the conditions following: If within five days after the first use of the machinery it fails to fill the warranty, written notice by registered letter shall be immediately given to the seller at Battle Creek, Michigan, and also to the local dealer, stating wherein the machinery fails to fill the warranty. In case the workman sent to fix the machinery does not leave it working satisfactorily, the purchaser shall give a second notice as before. If any part of the machinery cannot be made to fill the warranty, that part shall be returned immediately to the place where it was received, with the option of the seller to furnish other machinery or part in place of that returned, or return the money and notes received by the seller for the same, and to be released from any further liability. Failure to give any of the notices, or failure on the part of the purchaser to render friendly assistance in making the machinery work, or the keeping it after the five days allowed as provided above, shall be a waiver of the warranty, and a full release of the warrantor.

"No general or special agent or local dealer is authorized to make any change in this warranty. Workmen or experts are not agents, and have no authority to bind the company by any contract or statement. * * * This order is subject to the acceptance of the said company, and when so accepted is a binding contract, which no person has authority to modify, or to waive any of its conditions."

These conditions must be construed strictly against the seller, as they are intended to limit and minimize the force of the warranty. The plaintiff is a corporation, and can act only by agents; hence the provision that no person has authority to waive any of the conditions of the contract is not a limitation upon any particular agent or class of agents, but one upon the capacity of the corporation for future action, which it cannot impose upon itself; hence this particular provision cannot operate to prevent a waiver by the corporation of the conditions of the contract which would,

except for the prohibition, legally result from the acts of its authorized agents in reference to the machinery. *Lamberton v. Connecticut F. Ins. Co.*, 39 Minn. 129, 39 N. W. 76.

The defendant failed to give notice to the plaintiff at Battle Creek within five days after she commenced using the machinery, but she claims that such notice was waived by the conduct of the plaintiff. The defendant's evidence tended to show that the defendant commenced using the machinery August 23, 1895, and continued its use until September 18, or about 23 days, and that it failed to comply with the warranty in substantial particulars from the first, and was practically a failure as a threshing outfit; that the plaintiff's expert was present when the machinery was started, and that it did not work well; that plaintiff's local agent was notified the next day, and afterwards its general agent at Minneapolis, but no notice was sent to the plaintiff at Battle Creek until September 18; that during the time defendant was using the machinery some one agent, expert, or officer of the plaintiff was at the defendant's farm nearly every day, trying to make the machinery work as warranted, but failed so to do; among others the plaintiff's agent whose special line of work was looking after its machines in the field, its traveling agent, and its foremen of its separator and engine construction departments, respectively, from Battle Creek. Much of the defendant's testimony is contradicted by that of the plaintiff, which tended to show that the machinery was as warranted, and that the several agents, except those sent by the local agent, who were at defendant's farm while the machinery was being used, were there casually, and not in response to any notice of defects in the machinery. Upon the whole evidence we are satisfied that it was sufficient to sustain the finding that the plaintiff waived the sending of formal written notice to it at Battle Creek within the five days. *Massachusetts L. & T. Co. v. Welch*, 47 Minn. 183, 49 N. W. 740.

The plaintiff further claims that the defendant did not comply with the conditions of the warranty, because she did not return the machinery at the place where she received it.

The written contract provided that the machinery should be shipped for the defendant, in care of plaintiff's local agents at

Moorhead, and that the defendant should receive it on its arrival, subject to the conditions of the warranty. The defendant, when she found the machinery would not work, hauled it to her farm buildings, some seven miles from Moorhead, which, as she claimed, was the place at which she received it. There was evidence on the part of the defendant tending to show that it was agreed between her and the local agent that the machinery should be delivered to her at her farm, as she had no means of unloading it, and could not undertake to do it, and that the machinery was accordingly there delivered by the agent of the plaintiff; that the defendant notified the plaintiff of the fact of the failure of the machinery to fill the warranty, and also that it was at the place of delivery for the plaintiff; and, further, that after such notice, and about October 1, 1895, the plaintiff's secretary was at the defendant's farm, where the machinery then was, saw it there, and was informed by the defendant's husband and agent that it had broken down, and that he could not run it, and thereupon the secretary went away. There is no evidence that he objected to the machinery being left where it was, or offered to furnish other machinery in place of it. It remained where the secretary saw it until the plaintiff took possession of it on its mortgage. While the evidence as to some of these matters was conflicting, yet it was sufficient to sustain a finding that the defendant had substantially complied with the contract as to returning the machinery in case it could not be made to work.

It is also claimed by the plaintiff that the defendant did not perform the condition of the warranty as to rendering friendly assistance in the work of making the machinery operate. This, upon the evidence, was clearly a question of fact. Upon the whole evidence we are of the opinion that the evidence is sufficient to sustain the finding of the trial court that the defendant complied with the conditions of the warranty.

2. On the trial one of the plaintiff's experts, who was a witness on its behalf, testified, without objection, that the defendant's servant in charge of the separator was not a competent person to

run it. Thereupon questions were asked and rulings made as follows:

"Q. Did you have any talk with Mr. Wiedemann's foreman about the separator man? A. Yes, sir. Q. What did you tell the foreman? (Objected to as incompetent, irrelevant, and immaterial. Objection sustained. Exception.) Q. What did you say to the foreman, on the night of the day you started the engine, with reference to the competency of the man who was to take charge of the separator? (Objected to as incompetent, irrelevant, and immaterial. Objection sustained. Exception.) Q. What did the separator man who had been furnished by Mr. Wiedemann to take charge of the separator say to you with reference to his knowledge of separators and of this particular separator? (Objected to as above. Objection sustained. Exception.)"

These rulings are assigned as error. They were correct. The simple fact that the expert had a talk with the foreman about the separator man and his competency, or what the latter said to the expert on the subject, was *prima facie* immaterial. There was no evidence before the court at this time tending to show that the failure of the machinery to work was due to any improper management of it by the separator man. It did not appear from the questions that the answers would be material, and counsel made no statement or offer showing the materiality of the evidence sought to be elicited. *Austin v. Robertson*, 25 Minn. 431; *Scofield v. Walrath*, 35 Minn. 356, 28 N. W. 926.

3. The defendant, as a part of the purchase price of the machinery, delivered to the plaintiff certain second-hand machinery, which it was agreed should be received in payment for the new machinery at the sum of \$758. On the trial the plaintiff offered to show the actual value of this old machinery, which was objected to by the defendant on the ground that the value was fixed by the contract, and the court sustained the objection. This ruling is assigned as error, but, as the record shows no exception thereto, it cannot be here reviewed.

The court found that the defendant did pay \$758 on the purchase price of the machinery by delivering to plaintiff the old machinery, and finds as a conclusion of law that the defendant is entitled to recover \$758 and interest. This is also assigned as error.

The defendant, upon the rescission of the contract, was entitled to receive back the old machinery, or, if it was not returned to her, to recover its reasonable value. The contract price for the old machinery was only prima facie evidence of its reasonable value. The answer alleged this reasonable value to be only \$600, which sum the defendant claimed to recover of the plaintiff in lieu of the old machinery. There was, then, no issue in the case that the old machinery was worth any more than \$600. It is clear that the trial court erred in its conclusion of law that the defendant was entitled to \$758, or any greater sum than \$600 and interest. This is not a case of variance, as claimed by defendant, or the granting of greater relief than prayed for, which was consistent with the case made by the pleading, under the provisions of G. S. 1894, § 5413. It was the granting of relief beyond and outside of the case made by the answer. The defendant, having alleged that the value of the old machinery was only \$600, could not recover a greater sum therefor without amending her answer.

It is therefore ordered that a new trial herein be granted unless within 15 days after a remittitur is filed in the district court the defendant files her written consent that the findings of fact and conclusions of law of the trial court may be amended so as to reduce her money recovery to \$600, in which case the order appealed from is affirmed, and the judgment may be entered on the findings as so modified.

A motion for a reargument having been made, on June 7, 1898, an order was filed granting a reargument on briefs "upon the question raised" in appellant's original brief as to the divisibility of the contract for the sale of the threshing outfit.

On July 15, 1898, the following opinion was filed:

START, C. J.

A motion was granted for a reargument on the question whether the contract of sale and warranty of the threshing outfit here in controversy was divisible, and the defendant's right to rescind limited to such separate parts of the outfit as failed to comply with the warranty.

Our first impressions were that the contract was indivisible, because the machinery, constituting the subject-matter of the contract, consisted of but one entire threshing outfit, the whole thereof being absolutely essential for the purpose for which it was purchased at a gross price. Neither the engine nor the separator could be operated without the attachments belonging to them, respectively, and it seemed to be unreasonable and unjust to hold that, if the engine and separator failed to comply with the warranty, the defendant might rescind as to them, but must keep and pay for the (to her) worthless attachments. But a more careful examination of the contract satisfies us that the parties thereto expressly stipulated that it should be divisible. It was competent for them to so contract. The outfit consisted, as stated in the contract, of an engine, separator, stacker, feeder, water tank, pump, hose, and elevator, and the contract contained these stipulations:

"If any part of the machinery cannot be made to fill the warranty, that part which fails shall be returned, * * * with the option of the company either to furnish another machine or part in place of the machine or part so returned, * * * and thereby rescind the contract to that extent, or in whole, as the case may be, and be released from any further liability herein. The failure of any separate machine or any part thereof shall not affect the contract or liability of the purchaser for any other separate machine, or for any parts of such machine as are not defective."

Effect cannot be given to these express terms of the contract, except by holding, as we do, that the contract was divisible, and that the defendant's right of rescission was limited to that portion of the machinery which failed to comply with the warranty. See *Aultman v. Lawson*, 100 Iowa, 569, 69 N. W. 865. There is no evidence in the case that the stacker, water tank, pump, hose, and elevator did not comply with the warranty. The plaintiff was therefore entitled to recover the contract price as to these articles. This amount can be readily ascertained from the evidence by computation. The total contract price of the outfit was \$2,700. The evidence shows that the prices of each separate part of the whole outfit aggregate \$2,850, and that the separate prices of the engine, separator, and feeder, the parts which did not comply with the

warranty, aggregate \$2,470. The aggregate pro rata contract price of the engine, separator, and feeder would be \$2,340, which, deducted from the total contract price, \$2,700, leaves \$360, the contract price for the portion of the machinery the defendant must pay for. Therefore it is ordered that the order heretofore made herein be, and it is hereby, modified so as to read as follows:

Ordered that a new trial be granted, unless within 15 days after the remittitur is filed in the district court the defendant files her written consent that the findings of fact and conclusions of law of the trial court may be amended so as to reduce her money recovery to \$240, in which case the order appealed from stands affirmed, and judgment may be entered on the findings so modified.

HUGH WHITE v. LEEDS IMPORTING COMPANY and Others.

May 25, 1898.

Nos. 10,987—(109).

Action to Set Aside Execution Sale—Inadequate Price—Defect in Notice—Redemption by Junior Mortgagee.

A tract of land was subject to three liens which attached in the following order: (1) A judgment; (2) a mortgage to W.; and (3) a mortgage to P. The land was sold on an execution on the judgment, and the evidence of the sale placed on record. W. knew of the first lien, but, relying on the false and fraudulent representations of his mortgagor that it had been paid and satisfied, he made no investigation of the records, and did not discover that the land had been sold on execution until after the period of redemption. P., as mortgagee, redeemed from the sale. In an action by W. to set aside the execution sale on the ground of the inadequacy of the price bid at the sale, a defect in the notice of sale given by the sheriff, and the fraud of the mortgagor, *held*, that he was not entitled to such relief even upon condition of refunding to P. what he had paid to redeem; that P., as such redemptioner, was a bona fide purchaser for value, and could not be deprived of the property rights which he had acquired under the redemption.

Same—Redemptioner a Good-Faith Purchaser.

The fact that P. knew, or was chargeable with notice of, the defect in the notice of sale, and that the amount for which the property was bid off (the amount of the judgment) was greatly less than the value of the land, did not deprive him of the character of a bona fide purchaser.

Appeal by defendant F. J. Porter and others from an order of the district court for Nobles county, P. E. Brown, J., denying a motion for a new trial. The facts are stated in the opinion. Reversed.

J. A. Town and Lorin Cray, for appellants.

E. H. Canfield, for respondent.

MITCHELL, J.

The Leeds Importing Company was an Iowa corporation, consisting of only two members,—Goodenough, its president, and Cooper, its secretary and treasurer. It owned a tract of 157½ acres of land, worth from \$17 to \$18 per acre. In February, 1894, one Heron commenced an action for the recovery of money against the company, in which an attachment was issued and levied on this land. On March 31, 1894, the company executed a mortgage on the land to the plaintiff to secure the payment of \$1,738. This mortgage was duly recorded on April 2. At the time of the execution of this mortgage, plaintiff was informed of the existence of the attachment; but the secretary of the company told him not to give himself any uneasiness about it, that it would never bother him, that they would pay it off. On May 5, 1894, the company gave a second mortgage (in form a deed) on the same land to one Porter, to secure the payment of \$15,000 which it owed to him individually, or to a firm of which he was a member. This mortgage was also duly recorded.

On November 19, 1894, Heron obtained and docketed a judgment for \$199.09 against the company in the action in which the attachment had been issued and levied. This was the first lien on the land, plaintiff's mortgage being the second, and Porter's the third. Execution on Heron's judgment having issued on November 28, 1894, the sheriff advertised the land for sale on January 12, 1894,—an impossible date. On January 12, 1895, the land was bid off at the execution sale for \$180, by the son of Heron's attorney. A certificate of sale was executed and duly recorded. On the 17th of the same month, the purchaser at the execution sale assigned his certificate of sale to Cooper's wife. This assignment was placed on record. While Cooper transacted the business in the name of

his wife, the evidence is plenary that his wife was a mere figure-head in the transaction, and that Cooper himself was the real purchaser of, and paid the consideration for, the assignment. In an interview between plaintiff and Cooper about November 1, 1895, the court finds that

"Plaintiff was fraudulently advised by said Cooper, who then had in view the obtaining of this land for himself, that said claim of said Heron had been settled and paid, which statement said plaintiff believed and relied on."

The evidence justified this finding.

Defendant claims that the evidence shows that plaintiff had actual knowledge of the sale on Heron's execution prior to the expiration of the period of redemption. We do not think the evidence is such as to require a finding to that effect. On the contrary, it justifies the finding that he had no such knowledge until after the expiration of the redemption period, and just before the commencement of this action. On January 6, 1896, Porter duly filed his intention as mortgagee and creditor to redeem from the execution sale; and on January 16 he did so redeem, by paying \$194.75 to the sheriff, who executed to him a certificate of redemption. Shortly afterwards the plaintiff commenced this action to have the sale on the Heron execution set aside, and to foreclose his mortgage, tendering to Porter payment of the amount, with interest, which the latter had paid to redeem. The trial court granted him the relief prayed for; and, from an order denying a new trial, Porter and the other defendants beneficially interested in his mortgage appealed.

Had there been no redemption, and had the legal title under the execution sale become absolute in Mrs. Cooper, a court would make short work of this case; for Cooper's conduct indicates a fraudulent scheme on his part to cut out both plaintiff's and Porter's mortgages, and to obtain the land for himself, in the name of his wife, for about a fourteenth or a fifteenth of its value. But Porter's redemption has had the effect of defeating this scheme, and the contest is now between him and the plaintiff; the question being whether Porter should be permitted to hold the land for his

debt, which now amounts to about \$17,000, or whether the execution sale should be set aside, and matters placed in statu quo, so that plaintiff's mortgage, on which there is now due over \$2,200, would again become a first lien, and Porter's mortgage a second lien, on his being reimbursed for what he paid out to redeem from the Heron lien, which was prior to those of both plaintiff and Porter.

Plaintiff, as the ground for setting aside the execution sale, relies on the inadequacy of the price for which the land was sold, the defect in the notice of sale, and the fraud practiced upon him by Cooper. His counsel seems to argue the case as if, in case the sale is not set aside, Porter would get the land for the paltry sum which he paid to redeem. This is not so. The redemption extinguishes and pays his mortgage debt to the amount of the value of the land, less what he paid to redeem. *Sprague v. Martin*, 29 Minn. 226, 13 N. W. 34.

Porter was not a party to, and had no notice of, the fraud perpetrated on plaintiff by Cooper. It must be presumed that he knew of the discrepancy between the value of the land and the amount for which it sold on the Heron execution; but this is not of itself suggestive of any fraud, for in this state, where both the owner and lien creditors are allowed a year in which to redeem, the amount bid at either an execution or a mortgage sale is usually determined by the amount of the creditor's claim, and not by the value of the property. This disparity between the value of the land and the amount bid constitutes the main reason why Porter should redeem.

He was also charged by the records with constructive notice of the defect in the sheriff's notice of sale; but this was not very suggestive, in view of the statute providing that an officer's selling without giving the prescribed notice does not affect the validity of the sale, "either as to third parties, or parties to the action." G. S. 1894, § 5467.

The record also charged him with constructive notice that Wilson (and not the judgment debtor) had purchased at the sale, and subsequently assigned the certificate to Mrs. Cooper. But the same records which charged him with constructive notice of all these facts charged plaintiff with like notice of the same facts.

There is no evidence that he knew or had any reasonable ground for believing that plaintiff had no actual notice of these facts, or had been misled by any fraudulent representation by Cooper. On the contrary, he had a right to assume that plaintiff knew all the facts, but for some good reason did not desire to redeem. Porter was not plaintiff's guardian, and owed him no duty to look after his interests.

The situation was just this: The records disclosed a presumptively valid sale on a lien paramount to those of both himself and plaintiff. If there was no redemption, presumptively the liens of both mortgages would be extinguished. He was not required, and could not afford, to refrain from redeeming, and take the chances of the sale being set aside for some possible cause to him unknown. He did what he had a perfect legal right to do, and the only thing he could do under the circumstances, viz. file notice of his intention to redeem, and in due time redeem; there being no redemption by either the owner or the plaintiff. As such redemptioner, he became an innocent purchaser for value; and we discover no legal principle upon which he can be deprived of any of his property rights which he has acquired under his redemption.

Order reversed.

An application for a rehearing having been made, the following opinion was filed on June 17, 1898:

PER CURIAM.

The gist of counsel's application for a reargument is that the court based its decision upon the proposition that Porter, as redemptioner, was an innocent purchaser, whereas the burden was on him to prove that fact, and there was no evidence that he did not know of Cooper's fraud on plaintiff.

If this were the case of a purchaser by convention of the parties, there might be something in the point. But a redemptioner does not occupy in all respects the position of an ordinary purchaser. He is exercising a statutory right, and if he does not exercise it in the manner and at the time prescribed by statute the right is gone forever. Had Porter known of facts which might render the execution sale voidable at the suit of plaintiff, he would not have been

bound to refrain from redeeming, and hazard his right of redemption upon the chance that plaintiff would bring such a suit and prosecute it to a successful termination. As suggested in the opinion, he had a right to assume that plaintiff had the same knowledge of the execution sale as he himself had, and was entirely competent to protect his own interests.

Application denied.

MANNHHEIM INSURANCE COMPANY v. ERIE & WESTERN TRANSPORTATION COMPANY.

May 25, 1898.

Nos. 10,993—(86).

Connecting Carriers—Schedule of Interstate Rates—Rate Sheet—Uniform Bill of Lading—Limitation of Liability—Rate for Common-Law Liability.

Two connecting carriers, engaged in interstate commerce, filed with the interstate commission a schedule of rates, called "Official Classification," and also a rate sheet called "Joint East-Bound Interstate Tariff." The former stated, specifically and in detail, the rates under a certain form of bill of lading, called "Uniform Bill of Lading," limiting the common-law liability of the carriers, and further stated that the rates on property not shipped subject to the conditions of the Uniform Bill of Lading were a specified percentage higher than the reduced rates under the Uniform Bill of Lading. The rate sheet stated that all rates were to be used in connection with, and subject to, the Official Classification. *Held*, that this was making and establishing schedules of rates both under the Uniform Bill of Lading, and also under the full common-law liability.

Same—Reference in Rate Sheet to Official Classification.

Also, that the reference in the rate sheet to the Official Classification made the latter a component and concomitant part of the schedule of rates.

Same—Reasonableness of Rates.

Also, that, even if the rates under the full common-law liability were unreasonable and exorbitant, this fact would not render the rates under the limited liability invalid, provided they were themselves reasonable.

Same—Evidence of Combination against Anti-Trust Law.

Also, that there was no evidence in this case that the rates fixed were

the result of a combination or association formed in violation of the act of congress called the "Anti-Trust Law."

Same—Limitation of Liability—Consideration.

Also, that the evidence showed a consideration for the limitation of the common-law liability of the carrier.

Action in the district court for Ramsey county to recover \$1,920.64, the amount paid by plaintiff for the loss by fire of 750 sacks of flour covered by its policy of insurance. The other facts are stated in the opinion. The case was tried before Kelly, J., who found in favor of defendant. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Warner, Richardson & Lawrence, for appellant.

T. R. Palmer and Palmer & Beek, for respondent.

MITCHELL, J.

A somewhat extended statement of the facts is necessary to an intelligible decision of this case:

The defendant was a common carrier operating a line of vessels between the city of Milwaukee and various other ports on the Great Lakes, including Erie, Pennsylvania, where it connected with the Pennsylvania Railroad Company, with which it had a traffic arrangement whereby it was authorized to issue through bills of lading from Milwaukee to Baltimore. The defendant and the Pennsylvania Railroad Company duly established, issued, published, and filed with the interstate commerce commission a schedule of basic freight rates, designated as the "Joint East-Bound Interstate Tariff" (Exhibit 1), covering class freight rates on merchandise, including flour, shipped via the through line, consisting of the two companies, from Chicago or Milwaukee to Atlantic seaports, including Baltimore. This schedule stated that all rates were to be used in connection with, and subject to, the Official Classification No. 14.

This Official Classification (Exhibit 2) had been issued, published, and filed with the interstate commerce commission, and was used in connection with, and as a part of, the Joint East-Bound Interstate Tariff. One copy of this Joint Interstate Tariff was posted in a conspicuous place on the wall in defendant's office in Milwaukee,

and another in a book, open to, and in use by, the public, upon a table in the office. Copies of the Official Classification were also kept on a desk in the office near the door, for the use of the public. The same things were done in defendant's office in St. Paul. The interstate commerce commission received and accepted, and have always treated, this Official Classification and Joint East-Bound Interstate Tariff as a compliance with the laws of congress and the orders and directions of the commission.

The rate on flour from Milwaukee to Baltimore, as fixed by the Joint East-Bound Interstate Tariff, was 12 cents per 100 pounds, but in connection with, and subject to, the Official Classification. The rate fixed by the Official Classification was 12 cents per 100 pounds, if shipped subject to the "Uniform Bill of Lading conditions," but, if not shipped subject to the Uniform Bill of Lading conditions, property would be "charged twenty per cent. higher than as herein provided * * * and cost of marine insurance." The Official Classification further provided:

"(1) Unless otherwise provided in this classification, property will be carried at the reduced class rates specified herein, if shipped subject to the conditions of the Uniform Bill of Lading. * * * If shipper elects not to accept the said reduced class rates and conditions, he should so notify the agent of the receiving carrier at the time his property is offered for shipment, and if he does not give such notice it will be understood that he desires his property carried subject to the Uniform Bill of Lading conditions in order to secure the reduced class rates thereon. Property carried not subject to the conditions of the Uniform Bill of Lading will be at the carrier's liability, limited only as provided by common law, and by the laws of the United States and of the several states, in so far as they apply. Property thus carried will be charged twenty (20) per cent. higher (subject to a minimum increase of one [1] cent per one hundred pounds), than if shipped subject to the conditions of the Uniform Bill of Lading, and the cost of marine insurance will be added over any part of the route that may be by water."

The Uniform Bill of Lading limited the common-law liability of the carrier as follows:

"No carrier * * * shall be liable for any loss thereof or damage thereto [to property described in the bill of lading] by causes beyond its control, or by floods or by fire," etc.

It further provided that it was mutually agreed, in consideration of the rate of freight therein named, that every service to be performed by any carrier under the bill of lading should be subject to all the conditions therein contained, which the shipper thereby agreed to and accepted.

One Sheffield, at Walcott, Minnesota, was a manufacturer of flour, which he had been accustomed for years to ship to British and Irish ports over the Chicago, Milwaukee & St. Paul Railway to Milwaukee, and thence to the Atlantic seaboard over the line consisting of defendant's vessels and the Pennsylvania Railroad. In making these shipments he had always received and accepted the Uniform Bill of Lading. Printed copies of the Joint East-Bound Interstate Tariff and of the Official Classification had been regularly mailed to him,—as often, at least, as once a year; but he testified that he could not say that he had ever read them, or ever had his attention called to any rate of freight from Milwaukee to the seaboard over this line, except 12 cents per 100 pounds, as he was always after the lowest rate. The court finds that, by the exercise of ordinary care, he could have seasonably advised himself of the contents of the Official Classification.

October 1, 1894, the plaintiff issued to Sheffield its open or blanket policy, insuring him against loss by fire on all shipments made by him within one year to European ports. The policy provided that upon payment of any loss the insurer was to be subrogated to all the rights of the assured under the bills of lading, to the extent of such payment.

Subsequently Sheffield communicated with the defendant; asking for a rate from Milwaukee to London for 30 car loads of flour, to be shipped in separate lots from time to time during the month of August, 1895. The defendant neither owned, nor had any traffic arrangement with, any ocean transportation company; but it entered into negotiations with a steamship line, and secured a guaranty of a rate from Baltimore to London of $7\frac{1}{2}$ cents per 100 pounds on the 30 car loads to be shipped as proposed by Sheffield. This rate was for ocean transportation under the Uniform Bill of Lading, limiting the liability of the carrier. After this arrangement was consummated, Sheffield commenced shipping the flour,

and had delivered to the defendant several of the 30 car loads, for which the defendant delivered, and Sheffield accepted, through Uniform Bills of Lading to London at 19½ cents freight per 100 pounds from Milwaukee to London; this being made up of 12 cents from Milwaukee to Baltimore, and 7½ cents ocean freight.

While, as we understand the facts, the defendant had nothing to do with the transportation of the flour from Walcott to Milwaukee, yet by the bills of lading it acknowledged the receipt of the flour at Walcott, and became responsible for the transportation of it from that point. The advantages of this arrangement to Sheffield, by enabling him to contract in advance for the sale and delivery of his flour in London, and in negotiating his draft with the bills of lading attached, are too apparent to require explanation.

One shipment of 750 sacks of the flour was, without any negligence or want of due care on the part of the defendant, destroyed by fire during the life of plaintiff's policy, in defendant's warehouse at Milwaukee, while awaiting shipment on one of its vessels. The plaintiff paid the loss to Sheffield, took from him an assignment of the bill of lading and of all claim thereunder against the defendant, and then brought this action against it to recover for the loss.

Defendant's counsel make the points (1) that it, being a carrier exclusively by the Great Lakes, is not subject to the interstate commerce act; and (2) that it is exempted from liability for this loss by fire by R. S. (U. S.) § 4282. We shall assume, without deciding, that neither of these points is well taken.

Plaintiff's contention is that the defendant is liable as insurer, as at common law, notwithstanding the provision to the contrary in the bill of lading, for the following reasons:

(1) Inasmuch as the flour was specially classified in the Joint East-Bound Interstate Tariff sheet, and it was not necessary to refer to the Official Classification in order to ascertain its class, the words in the tariff sheet, "subject to Official Classification," did not apply.

(2) That it was the duty of the carrier to make and publish a rate with full common-law liability, and that this could be done only by

stating upon the Joint East-Bound Interstate Tariff sheet the common-law rate, either in figures, or by some appropriate language; that the words, "subject to Official Classification," did not inform the shipper that he is to look any further than the tariff sheet for the rate.

(3) That, assuming that the rate for full common-law liability had been properly published, it was exorbitant and unreasonable, and therefore void, under both the common law and the interstate commerce act.

(4) That the alleged common-law rate was the subject of a combination of all the trunk lines and their connections carrying merchandise between Chicago or Milwaukee and Atlantic ports, in violation of the act of congress known as the "Anti-Trust Act." 26 St., c. 209.

1. The first and second of these propositions may be considered together. The conclusion sought to be drawn from the proposition that no rates with full common-law liability were ever made and published is that it was the duty of the carrier to make and publish such rates; and if only one schedule of rates was ever made and published, that must necessarily have involved full common-law liability, notwithstanding anything in the schedule or the bill of lading to the contrary.

It will be discovered, by an examination of the interstate commerce act (25 Stat. 855-6, c. 382, § 6), that all it requires with reference to through joint rates over connecting lines is that the schedules shall be filed with the commission, and such publicity given to them as may be directed by it. It is stipulated that the schedules were so filed, and it does not appear what, if any, publicity the commission has ever required to be given to them, or that the defendant or the Pennsylvania Railroad Company has ever failed to comply with any direction of the commission in that regard. The rate sheet, standing alone, does not constitute the schedule of rates required by the law, but is only a part of it; the other part being the Official Classification referred to in it, and filed with it; and the two must be read together, as component parts of the schedule of rates. We think this is so understood and treated by the interstate commerce commission, and generally by shippers. The Offi-

cial Classification is quite a voluminous document, containing minute rules and regulations on a variety of subjects. It is impracticable to incorporate all these into the rate sheets; for rates are liable to constant changes, which may be made on a few days' notice, while the Official Classification, including rates and regulations, is very seldom changed. To compel the carrier to reissue the Official Classification every time a rate is changed would involve a great hardship and needless expense. Therefore, as we understand it, the commission has always recognized the Official Classification as a concomitant part of every schedule of rates, when proper reference thereto was made in the rate sheet. See Annual Report 1897, p. 85.

It is a matter of common knowledge that the great bulk of the freight of the country is now transported under bills of lading limiting the common-law liability of the carrier. It is the exception, and not the rule, for property to be carried under the full common-law liability. Hence, where the difference between the two rates is fixed upon a horizontal percentage basis, it would seem to be a very convenient method to state specifically and in detail only the rates under the Uniform (or limited liability) Bill of Lading, under which the great bulk of the business of the country is done, and then to state generally the percentage of increase over these rates where goods are transported with full common-law liability. All a proposed shipper under the common-law liability has to do is to refer to the Official Classification, to ascertain the rates under the Uniform Bill of Lading, and then add the percentage. This is a mere matter of arithmetical calculation. The fact (which is stipulated) that the interstate commerce commission has always treated this as a compliance with the laws of congress regulating commerce, and with the orders and directions of the commission, although perhaps not conclusive, is quite persuasive, upon this point.

In this case, under the evidence and findings of the court, Sheffield knew, or is chargeable with knowledge of, the contents of the Official Classification, and that the rate sheet, or Joint East-Bound Interstate Tariff, was to be used in connection with, and subject to, the Official Classification. With this knowledge, he consented and

agreed to ship his property under the Uniform Bill of Lading, and thereby assented to and accepted all its terms and conditions.

2. Assuming that the rate for full common-law liability was unreasonable (of which there is no proof, unless we are to take judicial notice of the fact that it is out of proportion to the rates under the limited liability), this will not render void the rates under the Uniform Bill of Lading, if they are in themselves reasonable, and the conditions of the bill of lading are not in conflict with public policy.

3. All that is necessary to be said of plaintiff's fourth proposition is that there is no evidence that the rates established were the subject or result of a combination and agreement among the trunk lines and their connections in violation of the Anti-Trust Act.

In view of what has been already said, it can hardly be necessary to add that there is nothing in the point that there was no consideration for the limitation on the common-law liability of the defendant.

Order affirmed.

CHRISTOPHER H. SMITH and Another v. NATIONAL CREDIT INSURANCE COMPANY and Others.

May 25, 1898.

Nos. 11,007—(76).

Action by Insurance Commissioner to Administer Trust Fund—Intervention by Stockholders—Discretion of Court.

In an action instituted by the insurance commissioner to administer and distribute a fund deposited with him in trust for the policy holders of the insurance company, *held* that, upon the facts, the court did not abuse its discretion in denying the application of the stockholders to intervene and become parties to the action.

Appeal by Freeman P. Strong and others, stockholders of defendant corporation, from an order of the district court for Hennepin county, Russell, J., denying their application for leave to file a complaint in intervention and to become parties defendant. The nature of the action is stated in the opinion. Affirmed.

Arthur M. Wickwire, for appellants.

Inasmuch as the insurance company had no power, by reason of its insolvency, to defend, and as the assignees also had no money or means with which to defend the vast number of claims made, the stockholders had an equitable right to defend on behalf of the corporation, on learning that the assignees had agreed with the creditors that the company's liability should be determined in a nonjudicial manner. *Morrill v. Little F. Mnfg. Co.*, 46 Minn. 260; *Bronson v. La Crosse & M. R. Co.*, 2 Wall. 283; *In re Minnehaha*, 53 Minn. 423; *Dodge v. Woolsey*, 18 How. 331; *Bacon v. Robertson*, 18 How. 480; *March v. Eastern*, 40 N. H. 548; *Wright v. Oroville*, 40 Cal. 20. Every citizen is entitled to have his liability determined by methods recognized as judicial. *In re Minnehaha*, *supra*. The ordinary rule that the stockholders must request the officers or directors to sue or defend does not apply, because neither the corporation nor the assignees have any means with which to defend; the assignees have consented that the company's liability might be determined in a nonjudicial manner. *Rothwell v. Robinson*, 39 Minn. 1; *Bjorngaard v. Goodhue Co. Bank*, 49 Minn. 483; *Board v. Lafayette*, 50 Ind. 85; *Cook, Stockh.* (3d Ed.) § 741. Inasmuch as the judgments which may be rendered against the insurance company will bind the stockholders in the suit to enforce their statutory liability, they have a personal interest, aside from protecting the corporation as such, in seeing that the judgments against the corporation are obtained in the ordinary way, and not upon ex-parte affidavits or by star-chamber methods. *Bacon v. Robertson*, *supra*; *Smith v. Hurd*, 12 Metc. (Mass.) 371; *Robinson v. Smith*, 3 Paige, 222. Judgment against a corporation is conclusive upon the stockholders in a suit to enforce their statutory liability. *Holland v. Duluth I. M. & D. Co.*, 65 Minn. 324; *Oswald v. Minneapolis Times Co.*, 65 Minn. 249. Intervention was the proper procedure for the stockholders to adopt in order to protect their rights and the rights of the insurance company. G. S. 1894, § 5273; *Bennett v. Whitcomb*, 25 Minn. 148; *Lewis v. Harwood*, 28 Minn. 428.

Chelsea J. Rockwood, Victor J. Welch, Lewis Schwager, Fifield,

Fletcher & Fifield, John F. Byers, Keith, Evans, Thompson & Fairchild and E. C. Gale, for certain respondents.

The appellants, if they ever had the right to come into the action and plead, have lost it by their unexcused delay. Stockholders have not the right, as a matter of course and under all circumstances, to defend suits against the corporation. When the right does exist, it is lost if not exercised promptly when the necessity arises, and the necessity arises, if at all, as soon as the action has been brought, and the corporation has defaulted. *Peabody v. Flint*, 6 Allen, 52; 4 Thompson, Corp. §§ 4494, 4495; *Cutler v. Button*, 51 Minn. 550. Appellants have not made a case upon their moving papers sufficient to entitle them to be made parties, for two reasons: (1) Appellants have not made any effort to obtain relief through the corporate authorities. They seek to excuse their failure upon the single ground that the corporation is insolvent and has not funds to pay the expenses of litigation. This excuse is not sufficient. *Hawes v. Oakland*, 104 U. S. 450; *Pomerox*, Eq. Jur. § 195; 4 Thompson, Corp. § 4479. (2) Appellants have not set forth any facts which would justify the court in granting them permission to plead to all of the claims that have been filed. The appellants have no interest in the result. The action is purely in rem, to foreclose the rights of the company and its assignees in the trust fund. The company being in default, the court has no power to render a judgment for any other relief than the specific relief demanded in the complaint. *G. S. 1894*, § 5413; *Minnesota Linseed Oil Co. v. Maginnis*, 32 Minn. 193. Any judgment which may be rendered in this action will not be admissible as evidence in the action against the stockholders. *Danforth v. National Chem. Co.*, 68 Minn. 308; *Buffum v. Hale*, 71 Minn. 190.

Young & Lightner, for certain respondents.

The moving papers of appellants show no grounds for sustaining their application. *Morrill v. Little F. Mnfg. Co.*, 46 Minn. 260. The stockholder must show diligence affirmatively. In the present case he shows a delay of two years with no attempt to excuse or explain. *Allen v. Wilson*, 28 Fed. 677; *Dumphy v. Traveller*, 146

Mass. 495; Dimpfell v. Ohio & M. Ry. Co., 110 U. S. 209; Leo v. Union Pacific, 19 Fed. 283.

MITCHELL, J.

In September, 1895, the defendant the National Credit Insurance Company made an assignment for the benefit of creditors. It had practically no assets except securities of the face value of \$100,000 on deposit with the insurance commissioner, and which were the subject of the litigation in *Smith v. National Credit Ins. Co.*, 65 Minn. 283, 68 N. W. 28, and *Hayne v. Metropolitan Trust Co.*, 67 Minn. 245, 69 N. W. 916. Within a few days after the execution of this assignment, the insurance commissioner and one of the policy holders of the insurance company commenced this action to have a receiver appointed to administer this trust fund for the benefit of all the policy holders. The insurance company, its assignees under the assignment for the benefit of creditors, and all the policy holders, are made defendants. Very soon after the commencement of this action, another action was brought by and on behalf of all creditors against the stockholders of the insurance company, to enforce their personal liability for corporate debts. That action is still pending.

Neither the insurance company nor the assignees have ever appeared or answered in the present action; and the court on August, 1896, appointed a receiver to take possession of and administer the trust fund in the hands of the insurance commissioner, and also appointed a referee to take and report to the court the evidence as to the claims of the various policy holders. Soon afterwards the various policy holders entered into stipulations evidently designed to supersede in part or modify the court's order of reference.

By the terms of these stipulations, it was provided that the referee might, without further proof, accept as proven the claims which had been adjusted and allowed by the insurance company before it made an assignment; that unearned paid premiums should be ascertained upon the basis of the original bonds and date of assignment without further proof; that, as proof of other claims, the referee might accept the ex-parte affidavits of the claimants in a form prescribed in the stipulations, and that, as to such claims

whose amounts are found correct, no testimony should be required to prove the other allegations of the answers of the policy holders except as to date of notice of claim or loss in case of dispute on that point; that the referee should examine the books and records and files of the insurance company with reference to each loss claimed, and make a summary statement of the facts as shown by such records and files, and that the amount of claims, as shown by such affidavits and statement made by the referee, should by him be returned to James I. Best, and should be accepted as sufficient proof of the amount of loss if satisfactory to said Best, who was agreed upon as commissioner to examine and pass upon verified claims; that, if the proof was not satisfactory to such commissioner, the claimant was put to the legal proof of the claim.

These stipulations have never been approved by the court, and were never filed in court until September 9, 1897. After the proofs of loss and the statement of the referee had been placed in the hands of Best, pursuant to the stipulations, and on or about August 30, 1897, the receiver sent notice to the attorneys of the policy holders calling their attention to their stipulations and what had been done under them, and notifying them that the report and statement of the referee had been filed with Best, and that objections to the allowance or disallowance of any claim should be made before the commissioner as early as October 1 next. On September 28, 1897, the appellants, who are stockholders of the insurance company, applied to the court for leave to come into this action, and file their complaint in intervention. The court denied their application, and from that order they appealed.

In the affidavits in support of their application they do not deny that they knew of the pendency of this action ever since its commencement, some two years previously, and that the insurance company and its assignees had failed to appear and answer. Neither do they allege that they had ever requested the company or its assignees to appear in the action; but, on the contrary, it fairly appears by inference that they themselves control the corporate organization. They allege, however, that neither the corporation nor its assignees have any assets with which to defray the expense of defending the action; nor do they allege that they ever kept any

watch over what was being done in the action. Their only claim is that they had a right to assume that claims of policy holders would be investigated, and allowed or disallowed, in a judicial manner, upon legal evidence, and that they had no knowledge or notice of the irregular and "nonjudicial" procedure agreed upon by the attorneys for the policy holders until the attention of some of them was called to it by the notice to the policy holders issued by the receiver.

It is very difficult to ascertain from their proposed complaint in intervention what defense, if any, they intend to interpose, or what relief they desire. It gives a full history of the assignment proceedings, the pending action against them as stockholders, and of the present action, including the decision of this court on the former appeal (65 Minn. 283, 68 N. W. 28), which, it suggests, adopted an incorrect method of computing the amount due a certain class of policy holders. It also states that while the company was in business a large number of invalid claims were presented by policy holders under a misapprehension of their legal rights; that the method of ascertaining the validity of claims adopted by the referee under the stipulation is imperfect and inadequate to ascertain the truth in a great many cases; that they are informed and believe that by the report of the referee a large number of invalid claims have been allowed, but they do not specify a single one of them; that, by reason of the premises, it is of vital importance to them as stockholders that they be allowed to become parties to the action, in order that the liability of the insurance company be ascertained in a proper and legal manner and according to due process of law. The fair inference to be drawn from this is that they propose to contest and overturn all that has been done in this action, including the decision of this court.

In our opinion their laches has been such as to justify, if not require, the court in refusing them the right to intervene for any such purpose. Knowing, as they did, of the pendency and purpose of this action, and knowing, as they presumably did, that the corporation had not appeared, they ought to have kept some watch over what was being done, and ought not to have rested supinely upon the assumption that everything was being done rightly. If

the allowance of claims in this action as valid debts of the corporation would be binding and conclusive against them as stockholders in the other suit, a court would be inclined to be liberal in excusing their laches. But this suit is brought merely to administer the fund held by the insurance commissioner in trust for policy holders, and the allowance of a claim is only operative for that purpose, and in no way concludes the stockholders in the suit against them, at least if they do not appear and litigate the validity of the claims in this action. The only interest which they have in having no invalid claims allowed in this case is that, the further the trust fund goes in paying claims, the less will be the balance of the debts for which they will be liable in the stockholders' suit.

If the appellants had applied merely for leave to appear in the action, and take the proceedings as they then stood, and to interpose such objections as they desired to the allowance of any of the claims filed, probably the court ought to have permitted them to do so, as this would not have delayed the administration of the fund. The court has never authorized or approved the mode of procedure stipulated by the policy holders, and might, in its discretion, refuse to approve of it if it thought that it had resulted in injustice; and probably the appellants ought on a proper showing to be allowed to appear and ask the court, not as a matter of right, but of grace and discretion, to refuse to confirm or approve what had been done under the stipulation. But this was not the scope or extent of what they asked.

The order appealed from should be affirmed, but without prejudice to appellants' right to apply hereafter for leave to intervene merely for the purposes just suggested. So ordered.

CHARLES W. SEXTON v. SEBA S. BROWN.

79 371
73 144

May 25, 1898.

Nos. 11,016—(116).

Garnishment—Fees of Surveyor General.

The fees of the surveyor general for the performance of his official duties are not subject to garnishment.

Appeal by plaintiff from an order of the district court for Hennepin county, Simpson, J., discharging Mississippi & Rum River Boom Company, as garnishee. Affirmed.

Welch, Hayne & Hubachek, for appellant.

John B. Atwater, for respondents.

MITCHELL, J.

A surveyor general of logs and lumber is a public officer whose compensation consists of fees to be paid by those for whom he performs services, and the sole question in this case is whether such fees are subject to garnishment. We are of opinion that the case is controlled by *Roeller v. Ames*, 33 Minn. 132, 22 N. W. 177, and *Sandwich Mnfg. Co. v. Krake*, 66 Minn. 110, 68 N. W. 606.

The decisions in those cases do not rest upon any question as to the character of the garnishee or as to the source from which the officer receives his fees, but upon the ground that it is against public policy to permit the salary or compensation of a public officer for the performance of his official duties to be intercepted by garnishment or other legal process before the money reaches his hands, for the reason that it would tend to impair the efficiency of the public service. This reason applies with equal force, whether the compensation of the officer consists of a fixed salary or a scale of fees for specific services, and whether his compensation is payable directly out of the public treasury or by those for whom the services are immediately performed. The fact that his compensation is paid by the particular parties for whom the services are performed, and the further fact that only a part of the public immediately require his services, do not render these services any the

less public in their nature. The entire public has an interest in the proper performance of the duties of the office.

What would be the result if the duties of the office were all personal, and had to be performed by the surveyor general in person, so that the fees allowed by law would all be for his own individual services, we need not inquire. We take judicial notice of the fact that the greater part of the services in scaling logs is done by deputies, assistants and employees whose compensation has to be paid by the surveyor general out of the fees allowed by law, so that he is, in a sense, a mere trustee of at least a part of the money derived from fees for the benefit of his deputies and assistants. It can be readily seen how they might be deprived of their compensation, and that the public service might thereby be interfered with, if the fees of the office could be intercepted by garnishment. Such a case, at least, is fully covered by the former decisions of this court.

Order affirmed.

MARY F. WHEADON v. WARREN H. MEAD.

May 25, 1898.

Nos. 11,027—(102).

**Principal and Agent—Loan of Principal's Money upon Mortgage—
Fraud—Negligence—Findings of Court.**

Held, that the findings of the trial court of certain evidentiary facts did not amount to a finding that the defendant was guilty of either fraud or negligence in the performance of his duties as plaintiff's agent in lending her money on real-estate security.

Same—Evidence.

Also, that the evidence was not such as to require such a finding.

Mortgage by Vendee to Third Person a Purchase-Money Mortgage.

Also, that, upon the facts, a mortgage executed by a vendee to a third person must be deemed as given to secure the purchase money.

Appeal by plaintiff from an order of the district court for Ramsey county, Kelly, J., denying a motion for judgment in her favor on the findings and that the court determine the damages to which she was entitled, and denying a motion for a new trial. Affirmed.

William G. White, for appellant.

Defendant had such a personal interest in the loan as disqualified him from making it as her agent, and gave her the right to repudiate the transaction and to recover the money. *Mechem*, Ag. §§ 454, 455, 457, 461, 462; *Marsh v. Whitmore*, 21 Wall. 178; *Donnelly v. Cunningham*, 58 Minn. 376; *Friesenhahn v. Bushnell*, 47 Minn. 443; *Rich v. Black*, 173 Pa. St. 92; *McKinley v. Williams*, 74 Fed. 94; *Williams v. McKinley*, 65 Fed. 4. The mortgage executed by Mrs. Lewis was not a purchase-money mortgage. It is essential to a purchase-money mortgage that it be given to secure a portion of the purchase price which the grantee has agreed to pay. Such a mortgage may, indeed, run to a third person, but he must purchase the money as part of the same transaction whereby the land is sold and with the understanding that the mortgage is to protect him to the same extent as if given to the grantor. *Jacoby v. Crowe*, 36 Minn. 93; *Heusler v. Nickum*, 38 Md. 270; 1 *Jones*, Mort. § 469; *Stansell v. Roberts*, 13 Ohio, 149; *Clark v. Munroe*, 14 Mass. 351; *Jones v. Parker*, 51 Wis. 218; *Kaiser v. Lembeck*, 55 Iowa, 244. Defendant failed to exercise reasonable care to obtain adequate security. *Lowenburg v. Wolley*, 25 Canada Sup. 51; *McFarland v. McClees* (Pa. St.) 5 Atl. 50; *Bank v. Western Bank*, 13 Bush, 526.

Warren H. Mead, for respondent.

A substituted mortgage to a third person is a purchase-money mortgage. *Jones v. Parker*, 51 Wis. 218; *Clark v. Munroe*, 14 Mass. 351; *McGowan v. Smith*, 44 Barb. 232; *Carr v. Caldwell*, 10 Cal. 380; *Nichols v. Overacker*, 16 Kan. 54; *Jackson v. Austin*, 15 Johns. 477; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76; *Kaiser v. Lembeck*, 55 Iowa, 244; *Jones v. Tainter*, 15 Minn. 423 (512); *Jacoby v. Crowe*, 36 Minn. 93; *Hurlbert v. Weaver*, 24 Minn. 30. Purchase money has been defined to be "Money paid for the land or the debt created by the purchase." *Austin v. Underwood*, 37 Ill. 438.

MITCHELL, J.

In the spring of 1889, the plaintiff, who resided in the state of New York, intrusted to defendant, who resided in St. Paul, \$1,200, to be by him, as her agent, loaned on real estate mortgage security.

The defendant loaned the money to one Olmsted, who, as security for its payment, executed to plaintiff a mortgage on a lot in St. Paul. This lot had been conveyed to Olmsted by the defendant and one Reilly, almost contemporaneously with the execution of the mortgage by Olmsted to plaintiff. Three or four years subsequently, Olmsted, who had been reputed a man of considerable means at the time he executed the mortgage, became insolvent, and defaulted in the payment of interest. Thereupon defendant brought about an arrangement by which a Mrs. Lewis bought the mortgaged premises from Olmsted for the amount of the mortgage, but, instead of paying the mortgage in cash, she executed to plaintiff a note for \$1,200, secured by mortgage on the lot. This note and mortgage were security for the same money represented by the Olmsted note and mortgage, but defendant neither released nor surrendered the latter. Mrs. Lewis' husband, then reputed to be a man of some means, joined with his wife in the execution of the note, but not in the execution of the mortgage. Lewis has since become insolvent, and his wife has not, and never had, any property except the mortgaged premises. The lot has proved to be utterly inadequate security for the money loaned on it. The plaintiff now tenders the defendant the note and mortgage, and brings this action to recover back her money and interest.

The ground on which she bases her right to recover is the alleged fraud, as well as negligence, of the defendant. The fraud charged is that the loan to Olmsted was merely colorable; that the lot was conveyed to him by defendant and Reilly to enable him to make the mortgage to plaintiff; but that the transaction was a scheme for their own benefit; and that defendant and Reilly retained plaintiff's money, and appropriated it to their own use. The negligence charged is lending the money to an irresponsible party on grossly inadequate security. The plaintiff also contends that the defendant had such a present interest in the transaction as to disqualify him from making the loan to Olmsted, and to give her the right upon discovery of the fact to repudiate the loan, and recover her money. The only finding of the court in that regard is that defendant and Reilly

"Had been in treaty with the said Olmsted prior to April, 1889, to sell and convey to said Olmsted said lot, in consideration of the transfer and delivery to them by said Olmsted of certain shares of stock of a corporation known as the North Shore Mining Company, and which then and there was the owner of about 575 acres of land situate near Port Arthur, * * * and which said stock said Mead and Reilly had agreed to receive, and did receive, in consideration of the transfer of said lot to said Olmsted, as and for the value of \$2,000."

This is merely the finding of an evidentiary fact, which does not amount to a finding that the defendant was guilty of fraud, or that he was personally interested in the loan, or was acting for himself in making it. There is no finding that the loan was a condition of, or an inducement to, the trade between Olmsted and defendant and Reilly, or that there was any connection between them except a mere coincidence in time.

The court further found

"That, at the time of said conveyance of said lot by Mead and Reilly to said Olmsted, it was worth not to exceed the sum of \$1,200."

This also is nothing more than an evidentiary fact, of much weight, doubtless, but not amounting to, or the equivalent of, a finding that the defendant was guilty of either fraud or negligence in making the loan. The defendant was bound merely to exercise reasonable skill and ordinary diligence; that is, the degree of skill and diligence usually possessed and exercised by men of ordinary capacity and care engaged in the same business. It by no means necessarily follows that defendant did not exercise this degree of skill and care in making the loan, because in the light of subsequent experience it may now be concluded that the lot was not at the time of the loan worth more than \$1,200. Therefore, the findings as made did not entitle the plaintiff to judgment. The court found that the other allegations of the complaint were not true. Among these allegations was the following:

"That the defendant did not use good faith towards this plaintiff in investing and in loaning said sum of money, and did not use reasonable skill and diligence in loaning and investing the same, and in procuring proper and sufficient security for the repayment thereof."

The finding of the court that this was not proven is assigned as error. This presents the question whether the evidence conclusively proved that the defendant was guilty of either fraud or a lack of reasonable skill and diligence in loaning plaintiff's money.

We think that there was an entire absence of evidence of fraud either in fact or in law. The undisputed evidence is that the sale of the lot to Olmsted by defendant and Reilly for the mining stock had been verbally agreed on long before defendant received plaintiff's money, and that the deal was only conditioned upon the sufficiency of the title to the land which the stock represented, and that the execution of the deed was delayed pending the examination of the title; that, as already stated, there was no connection, save coincidence in point of time, between the conveyance of the lot to Olmsted and the loan of plaintiff's money; that the money was actually paid to Olmsted; and that defendant was in no way interested in or received any benefit from it.

Viewing the transaction retrospectively, in the light of subsequent experience and under changed conditions, men would be very liable to conclude that there was a lack of sound judgment and reasonable care in loaning \$1,200 on this property. But nothing would be more unjust than to test a man's acts in 1889, while the real-estate boom still continued, by the conditions existing in 1897. No one who has not passed through one of these booms can realize how extravagant men become in their opinions as to the values of property, and how largely the judgment of even ordinarily prudent and conservative business men is influenced by the atmosphere surrounding them. After the boom has subsided, men can hardly believe that persons of ordinary business capacity and intelligence could ever have entertained such extravagant ideas of values; and hence, even when we honestly attempt to judge of their actions in the light of the conditions then existing, our judgment is liable to be unconsciously influenced by the changed conditions now existing. A number of witnesses presumably of ordinary intelligence, who were acquainted with values in 1889, testified that this lot was considered reasonably worth \$2,000 at that time. The evidence also reasonably tended to prove that it was customary and considered safe at that time to lend money on real estate to the extent

of from one-half to three-fourths of its value, and that such mortgages readily sold at par. In view of this, we cannot say that the evidence was such as to require a finding that the defendant failed to exercise ordinary skill and care in making this loan.

There is no claim, and can be none, that defendant was guilty of any fraud in the subsequent transaction in which the Lewis mortgage was taken; nor was there any evidence of a lack of ordinary skill and care (unless in one particular, hereafter referred to) in taking the mortgage. Plaintiff's contention is that this was a new loan, and that the lot was then, according to defendant's own admissions, entirely inadequate security. But this was in no proper sense a new and original loan, and the fact that defendant called it that in his letters to plaintiff does not make it so. The plaintiff had the same and all of the security which she had before, and what at the time was considered additional security, viz. the personal obligation of Mrs. Lewis' husband. Moreover, defendant had informed plaintiff that the property had depreciated from one-third to one-half since the loan was made to Olmsted. He also advised her what he had done, and why he did it, to which she made no objection.

It is urged, however, that the Lewis mortgage is void, because Mrs. Lewis' husband did not join in the execution of it, and that defendant was negligent in taking the mortgage without the husband joining in its execution. The trial court held that this was, in contemplation of law, a "purchase-money" mortgage; and in this, we think, the court was right. While the deed from Olmsted to Mrs. Lewis was merely "subject" to the mortgage, and did not contain any "assumption clause," yet the evidence is to the effect that she bought it for the amount of the mortgage, \$1,200, which was the only consideration for the conveyance, and as a part of the same transaction executed a mortgage for that amount to plaintiff. Had she executed a mortgage to Olmsted, it certainly would have been a purchase-money mortgage. Instead of that, she executed her mortgage for the amount on the property purchased to Olmsted's creditor and mortgagee. On these facts, it is a substituted mortgage to a third party for the purchase money. *Jones v. Tain-*

ter, 15 Minn. 423 (512); *Jacoby v. Crowe*, 36 Minn. 93, 30 N. W. 441.
Order affirmed.

L. A. KERTSON v. GREAT NORTHERN EXPRESS COMPANY.

May 25, 1898.

Nos. 11,053—(71).

Replevin—New Trial—Insufficient Evidence—*Hicks v. Stone*, 13 Minn. 398 (434), Followed.

An order granting a new trial on the ground that the decision is not sustained by the evidence affirmed, under the rule of *Hicks v. Stone*, 13 Minn. 398 (434).

Decision—Memorandum of Judge.

A memorandum filed by a trial judge is no part of his decision.

Appeal by plaintiff from an order of the district court for Clay county, Baxter, J., granting a motion for a new trial. Affirmed.

W. B. Douglas, for appellant.

Wm. R. Begg, for respondent.

MITCHELL, J.

Action in replevin. The property, a coat, was shipped by plaintiff's sister-in-law, at Belvidere, Illinois, over defendant's express line, consigned to him at Moorhead, Minnesota, "C. O. D. \$50." When the coat reached its destination, the plaintiff tendered defendant's charges for transportation, and demanded the property, which the defendant refused to deliver unless he would also pay the \$50. This plaintiff refused to pay, and then brought this action.

It appeared on the trial that plaintiff was the general owner of the coat, but that his sister-in-law, the consignor, claimed a lien upon it for the payment of \$50, which she claimed he owed her on a board bill. Plaintiff claimed that he had paid her in full, and consequently owed her nothing; and practically the only question litigated, or upon which evidence was produced, on the trial, was whether there was anything due her from plaintiff for board. The

evidence on this question was conflicting, and would have justified a finding either way.

It appeared from the evidence that in July, 1896, plaintiff had sent his brother a check for \$75 on account of board, in response to which the brother's wife wrote him, calling his attention to the fact that the check was for only \$75, whereas it ought to have been for \$125, but adding that, in consideration of certain facts, she would call the balance due \$25, for which amount she requested him to send a check at once, or they would be compelled to keep the coat. The plaintiff, however, testified that he received a subsequent letter from her in which she claimed \$50 to be due her. He never made any further remittance, but on September 16, 1896, wrote his brother to have his wife return the coat; adding, "She can send it C. O. D. by express for the balance I owe her." It appears to have been in compliance with this request that she sent him the coat.

The court found in favor of the plaintiff, but subsequently granted a new trial on motion of the defendant, made on the ground that the decision was not sustained by the evidence. Upon this state of the evidence, the order granting a new trial must be affirmed, under the familiar rule of *Hicks v. Stone*, 13 Minn. 398 (434).

Aside from the dispute as to whether plaintiff actually owed his sister-in-law anything (which seems to have been the sole issue on the trial) the evidence tended to prove that plaintiff knew that his sister-in-law claimed that the balance due her was \$50, and that, without any objection to this amount, he requested her to send him the coat C. O. D. for the balance he owed her, and that in compliance with this request she shipped the coat. If this state of facts existed, we are of the opinion that he is estopped by his conduct from claiming the possession of the property from the express company, except upon compliance with the terms and conditions upon which he requested it to be shipped within the jurisdiction of the state.

Another point may be alluded to in this connection, although not directly made by counsel. We think the evidence tends to show that, when plaintiff requested the coat to be shipped C. O. D., he

never intended to pay the consignor's claim, but that he made the request merely for the purpose of getting her to send the property into the state, so that he could replevy it. If so, his conduct amounted to a fraud upon her, as well as upon the jurisdiction of the court, as much as if he had by some fraudulent pretense decoyed her into the state for the purpose of securing personal service of legal process upon her. *Columbia Placer Co. v. Bucyrus S. S. & D. Co.*, 60 Minn. 142, 62 N. W. 115. Such a fraud, if found to exist, would be good ground for vacating the replevin proceedings and dismissing the action. Whether this must be done on motion or by special plea in abatement, or whether the point can be raised when the fact appears from the evidence on a trial on the merits, it is not necessary to consider at this time. But upon the whole evidence the order appealed from must be affirmed, under the rule already referred to.

We are referred to the memorandum filed by the trial judge, which indicates that the sole ground upon which he granted a new trial was that the defendant, as a common carrier, could not dispute the consignor's title; also, that the rightful owner cannot reclaim from a common carrier property delivered to it by a wrongful holder. If the court meant this, he was clearly in error as to the law; but the memorandum is no part of the decision or of the record, upon which alone the case must be considered and determined.

Order affirmed.

DAVID SWANK v. ST. PAUL CITY RAILWAY COMPANY.

May 25, 1898.

Nos. 11,161—(64).

Renewal of Lease—Option of Lessee—Covenant of Lessor.

A lease for the term of one year contained a provision that, if all of the two lots of which the leased premises were a part were not sold or leased at the expiration of this lease, "then said second party [the lessee] is to have this said lease renewed for a term of one year more at its expiration on the same terms." *Held*, that the covenant for re-

newal was not mutual, but the covenant of the lessor only to renew if the lessee so elected.

Appeal by defendant from a judgment of the district court for Ramsey county, in favor of plaintiff, for \$619.06, entered in pursuance of the findings and order of O. B. Lewis, J. Reversed.

John Cavanagh and Munn & Thygeson, for appellant.

Palmer & Beek, for respondent.

MITCHELL, J.

The plaintiff executed to defendant a lease, for the term of one year, of the whole of one and a part of the other of two contiguous lots in the city of St. Paul, with the buildings thereon, to be used and occupied for stabling purposes. Immediately following the habendum clause, the lease contained a provision that,

"If all of lots 17 and 18 of block 67 aforesaid are not sold or leased at the expiration of this lease, then said second party [the lessee] is to have this said lease renewed for a term of one year more at its expiration on the same terms."

The lease was signed by both parties. This action is brought to recover damages for defendant's refusal to accept and execute a lease for a second year. See *Swank v. St. Paul City Ry. Co.*, 61 Minn. 423, 63 N. W. 1088. The dispute between the parties is as to the proper construction of the clause italicized, viz. whether it amounts to a mutual covenant for a renewal or a covenant on the part of the lessor only to renew if the lessee so elect.

We find no other covenant or condition in the lease which tends to aid in the construction of this clause. The lease was drawn by a layman (the lessor), and this provision is not couched in language which one learned in the art of conveyancing would probably have used. But we think the natural and more reasonable construction is that it is the covenant of the lessor alone, and that its meaning is that the lessee was to have the right, at his option, to a lease for another year in case the lessor had not in the meantime sold or leased to some one else all of the two lots. We think this is the way in which nineteen out of twenty laymen would have understood it. The meaning which the ordinary man would attach to the statement that the lessee was, upon the condition named, to

have the lease renewed, would be, not that it must renew it, but that it should have the right or privilege of having the lease renewed. A renewal involved the execution of a new lease by both parties, and we think that, if they had intended the covenant to be mutual, they would have naturally chosen different language; as, for example, "the lease shall be renewed," "it is to be renewed," or "the parties shall renew."

It will be noted that the covenant for a renewal is only subject to the condition that the lessor had not previously sold or leased all of the two lots. If he had sold or leased only a part of them, the covenant would remain in full force; and, if mutual, the lessee would be bound to accept a lease of the remainder of the leased premises at the same terms,—that is, at the same rent, not a proportionate part of it. It is so improbable that this was the intention of the parties as almost necessarily to compel the conclusion that the covenant is unilateral, and merely gives the lessee the privilege of renewing at its option. There is another fact which, we think, is entitled to some consideration. The lease was prepared, and its language chosen, by the lessor himself; and while it is true that, when the lessee accepted it, the instrument became its contract as well as that of the lessor, yet, if the language is so ambiguous as to be equally susceptible of either one of two constructions, the ambiguity should be resolved against the lessor. As it is a mere question of the construction of the language of a written contract, and as no other contract may ever be found in all respects exactly like it, any further discussion would be unprofitable.

Judgment reversed.

SWEDISH-AMERICAN NATIONAL BANK OF MINNEAPOLIS v. T.
BLEECKER.

May 31, 1898.

Nos. 10,947—(70).

72	383
79	336
72	383
80	480
72	383
842	283
52	195n

Garnishment—Foreign Insurance Company—Service on Insurance Commissioner—Action in Rem.

The defendant, a resident of North Dakota, insured his house, situated in that state, against loss by fire in the garnishee, a foreign insurance company organized in England and doing business in North Dakota and in this state. A loss occurred, and this action was brought in this state by a creditor of defendant. Service was made on the garnishee by serving on the insurance commissioner, and service in the main action was made on the defendant by publication. None of the transactions out of which the indebtedness arose took place in this state, and the indebtedness was not payable in this state. *Held*, the action was one in rem.

Same—Situs of Debt at Domicile of Creditor.

Held, further, as between different states or sovereignties, the situs of a debt is at the domicile of the creditor; but the statute may, for the purpose of attachment or garnishment, give the debt a situs also at the domicile of the debtor.

Same—Stipulation as to Process Filed with Insurance Commissioner—Effect of Stipulation.

Our statute requires a foreign insurance company, before doing business in this state, to file a stipulation agreeing that any legal process affecting such company, served on the insurance commissioner, shall have the same effect as if personally served on the company. *Held*, such a stipulation filed by the garnishee does not give it a domicile in this state for all purposes, or bring into this state the situs of a debt which it owes elsewhere by reason of business transacted elsewhere, and such a debt cannot be seized in an action in rem in this state.

Appeal by defendant from a judgment of the district court for Hennepin county, adjudging that plaintiff recover of Commercial Union Assurance Company (Limited) of London, garnishee, the sum of \$800, entered in pursuance of the order of Simpson, J. *Reversed*.

Gilfillan, Willard & Willard, for appellant.

In a garnishment proceeding, where the defendant is not served and does not appear, the court acquires jurisdiction only by attachment of the res. The proceeding is purely in rem. *Aultman, Miller & Co. v. Markley*, 61 Minn. 404; *Plummer v. Hatton*, 51 Minn. 181; *Lydiard v. Chute*, 45 Minn. 277; *Kenney v. Goergen*, 36 Minn. 191; *Douglass v. Phoenix Ins. Co.*, 138 N. Y. 209, 218; *Pennoyer v. Neff*, 95 U. S. 714, 728. Assuming that the res in this case was present in this state, for purposes of garnishment, jurisdiction over it could be obtained only by service of the garnishee summons on the person in whose possession it was. Garnishment is a purely statutory remedy, and the requirements must be strictly followed. 2 *Shinn, Attachm. & Garn.* § 485; *Scott v. McNeal*, 154 U. S. 34, 46; *Netter v. Board of Trade*, 12 Ill. App. 607; *Kennedy v. McLellan*, 76 Mich. 598. Proper service of the garnishee summons upon the garnishee is jurisdictional. *Schindler v. Smith*, 18 La. An. 476; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *Hartford F. Ins. Co. v. Owen*, 30 Mich. 441; *Epstein v. Salorgne*, 6 Mo. App. 352; *State v. Duncan*, 37 Neb. 631; *Nelson v. Sanborn*, 64 N. H. 310; *Edler v. Hasche*, 67 Wis. 653. And any insufficiency of service upon the garnishee is fatal. *Swallow v. Duncan*, 18 Mo. App. 622; *Central Trust Co. v. Chattanooga R. & C. R. Co.*, 68 Fed. 685; *Hebel v. Amazon Ins. Co.*, *supra*. The garnishee cannot waive any of defendant's rights. *Aultman, Miller & Co. v. Markley*, *supra*; *Epstein v. Salorgne*, *supra*. Garnishment being purely statutory, courts of general jurisdiction in entertaining proceedings under it become courts of special limited jurisdiction and, as such, their authority to entertain it and their authority to proceed against the res must appear affirmatively upon the record. Nothing is to be presumed in favor of the jurisdiction. *Drake, Attachm.* § 87b; *Thatcher v. Powell*, 6 Wheat. 119; *Haywood v. Collins*, 60 Ill. 328; *Eaton v. Badger*, 33 N. H. 228; *Waples, Garn.* 329; *Star Brewery v. Otto*, 63 Ill. App. 40. The garnishee summons in this action was served upon the state insurance commissioner, and no other service will be presumed. *Barber v. Morris*, 37 Minn. 194; *Godfrey v. Valentine*, 39 Minn. 337; *Hempsted v.*

Cargill, 46 Minn. 143; Jewett v. Iowa Land Co., 64 Minn. 539; Galpin v. Page, 18 Wall. 350, 366.

Under Laws 1895, c. 175, § 77, it is only in actions or proceedings against the company itself that service can be made upon the insurance commissioner, and that the commissioner is authorized to receive service. *Rehm v. German I. & S. Inst.*, 125 Ind. 135; *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114, 124; *Moore v. Speed*, 55 Mich. 84; *Smith v. Mutual L. Ins. Co.*, 14 Allen, 336; *Sawyer v. North Amer. L. Ins. Co.*, 46 Vt. 697; *Seamans v. Christian Brothers Mill Co.*, 66 Minn. 208; *Central R. & B. v. Carr*, 76 Ala. 388; *Reimers v. Seatco Mnfg. Co.*, 37 U. S. App. 426; *Lafayette Ins. Co. v. French*, 18 How. 404. If the legislature had intended that process could be served upon the insurance commissioner, it would have so declared or have left the law as it was prior to 1895. G. S. 1894, §§ 3183, 3189. If a foreign insurance company, doing business in this state, is subject to garnishment at all, it must be by virtue of the indirect provision in G. S. 1894, § 5311, which statute must be strictly followed, and service must be made upon the "agent" of such corporation. *Gibbs v. Queen Ins. Co.*, 63 N. Y. 117; *Danforth v. Penny*, 3 Metc. (Mass.) 564. The state insurance commissioner is not such an agent. Unless the company has, at the time of service, some liability outstanding in this state, the commissioner is not authorized to receive or accept service. His authority terminates as soon as the company is relieved from liability here. Laws 1895, c. 175, § 77; G. S. 1894, § 3185. To sustain its garnishment, respondent must sustain the jurisdiction of the court at every step. *Drake, Attachm.* § 87b; *Eaton v. Badger*, *supra*; *Boswell v. Otis*, 9 How. 350; *Ransom v. Williams*, 2 Wall. 313. Plaintiff must make it appear that the commissioner was qualified to receive service, and hence must show that there was some liability of the garnishee outstanding in this state. This must appear from the record, see cases *supra*, *Waples, Garn.* 330, and from the return of service, *Waples, Garn.* 332. The loss under the policy was not subject to garnishment in this state. If there is no jurisdiction over the garnishee there is none over the res, and if none over the res there can be none over the defendant. *Aultman, Miller & Co. v. Markley*, *supra*; *Stevenot v. Eastern Ry. Co.*, 61 Minn. 104; *Gates v. Tusten*,

89 Mo. 13; *Martz v. Detroit F. & M. Ins. Co.*, 28 Mich. 201; *Jones v. Crews*, 64 Ala. 368; *Steen v. Norton*, 45 Wis. 412; *Raymond v. Rockland Co.*, 40 Conn. 401; *Nelson v. Sanborn*, 64 N. H. 310; *Insurance Co. v. Friedman*, 74 Tex. 56; *Ahrens & O. Mnfg. Co. v. Patton S. D. & B. Co.*, 94 Ga. 247; *Rood, Garn. § 271*; 2 *Shinn, Attachm. & Garn. § 664*. The debt was not in this state. *Central Trust Co. v. Chattanooga*, 68 Fed. 685; *Reimers v. Seatco Mnfg. Co.*, *supra*; *Everett v. Connecticut M. L. Ins. Co.*, 4 Colo. App. 509; *Ward v. Boyce*, 152 N. Y. 191; *Douglass v. Phoenix Ins. Co.*, *supra*; *Straus v. Chicago G. Co.*, 108 N. Y. 654; *Wood v. Furtick*, 17 Misc. 561; *Illinois C. R. Co. v. Smith*, 70 Miss. 344; *Atchison, T. & S. F. R. Co. v. Maggard*, 6 Colo. App. 85; *Alabama G. S. R. Co. v. Chumley*, 92 Ala. 317; *American C. Ins. Co. v. Hettler*, 37 Neb. 849; *Morawetz v. Sun Ins. Co.*, 96 Wis. 175; *Reiner v. Hurlbut*, 81 Wis. 24; *Louisville & N. R. Co. v. Dooley*, 78 Ala. 524; *Craig v. Gunn*, 67 Vt. 92; *Osborne v. Shawmut Ins. Co.*, 51 Vt. 278; *Bucy v. Kansas C. M. & B. R. Co. (Miss.)* 22 South. 296; *Williams v. Ingersoll*, 89 N. Y. 508; *Mason v. Beebee*, 44 Fed. 556; *Daniels v. Meinhard Bros.*, 53 Ga. 359; *Kelley v. Machine*, 4 Ohio L. D. 374; *Caledonia Ins. Co. v. Wenar (Tex. Civ. App.)* 34 S. W. 385; *Pennoyer v. Neff*, *supra*; *Lawrence v. Smith*, 45 N. H. 533; *Green v. Farmers & C. Bank*, 25 Conn. 452; *Rorer, Inter-St. Law*, 179; 2 *Shinn, Attachm. & Garn. § 626*; *Stevenot v. Eastern Ry. Co.*, *supra*; *Bates v. Chicago, M. & St. P. R. Co.*, 60 Wis. 296; *Reno, Non-Residents*, § 169.

A judgment of this court, under which the garnishee should pay this money to plaintiff, would be no defense to an action on the policy in North Dakota by defendant against the company. *Thompson v. Whitman*, 18 Wall. 457; *Lafayette Ins. Co. v. French*, 18 How. 404; *Douglass v. Phoenix Ins. Co.*, *supra*; *Laing v. Rigney*, 160 U. S. 531; *Ward v. Boyce*, *supra*; *Pennoyer v. Neff*, *supra*. The natural place for bringing a suit on this policy would be North Dakota, where the creditor lives, or New York, where the loss is payable. If brought in the former state, whether or not the company would have to pay twice, would, as we have seen, depend on what that court should hold on the question of the jurisdiction of the Minnesota court. If brought in New York, the company would

have to pay its loss twice. *Douglass v. Phoenix Ins. Co.*, supra; *Reiner v. Hurlbut*, supra; *American C. Ins. Co. v. Hettler*, 37 Neb. 849; *Edwards v. Roepke*, 74 Wis. 571. The decision in the *Harvey* case was largely based on *Embree v. Hanna*, 5 Johns. 101. That case, as modified by *Martin v. Central V. R. Co.*, 50 Hun, 347, and *Douglass v. Phoenix Ins. Co.*, supra, still stands as the law of New York, but the courts of that state from the time of that decision have held that an action of this kind cannot be maintained. *Ward v. Boyce*, supra; *Douglass v. Phoenix Ins. Co.*, supra; *Straus v. Chicago G. Co.*, supra; *Martin v. Central V. R. Co.*, supra; *Williams v. Ingersoll*, supra.

The insurance company is not in this state for any such purpose. It remains for such purposes a resident of the state or country of its creation. *Broome v. Galena, D., D. & M. Packet Co.*, 9 Minn. 225 (239); *Douglass v. Phoenix Ins. Co.*, supra; *Reimers v. Seatco Mfg. Co.*, supra; *Smith v. Mutual L. Ins. Co.*, supra; *Bank v. Earle*, 13 Pet. 519, 588; *Lafayette Ins. Co. v. French*, supra; *Shaw v. Quincy M. Co.*, 145 U. S. 444, 451; *Railroad Co. v. Koontz*, 104 U. S. 5; *Douglass v. Phoenix Ins. Co.*, supra. That a foreign corporation, by sending its agents into different states to transact its business, does not thereby become a resident thereof, appears from the fact that a state cannot pass a valid law forbidding such corporation from removing actions brought against it from the state to the federal courts on the ground of diverse citizenship. *Southern Pac. Co. v. Denton*, 146 U. S. 202; *Reimers v. Seatco Mfg. Co.*, supra. To uphold this garnishment is to violate the fourteenth amendment to the constitution. It is not "due process of law." *Burton v. Platter*, 10 U. S. App. 657; *Ward v. Boyce*, supra; *Douglass v. Phoenix Ins. Co.*, supra; *Dorr v. Rohr*, 82 Va. 359, 364. See *Haywood v. Collins*, 60 Ill. 328.

L. R. Larson and A. Ueland, for respondent.

Service of the garnishee summons on the insurance commissioner was service on the garnishee. Laws 1895, c. 175, § 77. A garnishment proceeding against an insurance company is "an action against it" by the defendant, but in the name of and for the benefit of the plaintiff. *Irwin v. McKechnie*, 58 Minn. 145; *Caldwell v.*

Stewart, 30 Iowa, 379; McKelvey v. Crockett, 18 Nev. 238; Harris v. Phoenix Ins. Co., 35 Conn. 310; Dewey v. Garvey, 130 Mass. 86; Cross v. Spillman, 93 Ala. 170; Whitman v. Keith, 18 Oh. St. 134, 145; Steen v. Norton, 45 Wis. 412. Service of garnishee summons on corporations, where no special manner is provided, may be made in the manner provided for the service of summons upon such corporations in ordinary actions. Boyd v. Chesapeake & O. C. Co., 17 Md. 195; Hebel v. Amazon Ins. Co., 33 Mich. 400; Baltimore & O. R. Co., v. Gallahue, 12 Grat. 655; Railroad v. Barnhill, 91 Tenn. 395; G. S. 1894, § 5308. The insurance company was subject to garnishment in this state. Foreign corporations are subject to garnishment in all cases in which an original action may be commenced against them in the courts of the state to recover the debt in respect to which the garnishment process is served. 2 Shinn, Attachm. & Garn. § 493; 8 Am. & Eng. Enc. 1131; Neufelder v. German A. Ins. Co., 6 Wash. 336; Railroad v. Barnhill, supra; Glover v. Wells, 40 Ill. App. 350; Hannibal & St. J. R. Co. v. Crane, 102 Ill. 249; Fithian v. New York & E. R. Co., 31 Pa. St. 114; Barr v. King, 96 Pa. St. 485. A garnishment statute is remedial and should be liberally construed. Peoria Ins. Co. v. Warner, 28 Ill. 429. A foreign insurance company can be garnished by virtue of G. S. 1894, § 5311. National Bank v. Huntington, 129 Mass. 444; National F. Ins. Co. v. Chambers, 53 N. J. Eq. 468. The loss under the policy was subject to garnishment in this state. Harvey v. Great Northern Ry. Co., 50 Minn. 405; Cross v. Brown, 19 R. I. 220; Wyeth H. & M. Co. v. Lang, 127 Mo. 242; Plimpton v. Bigelow, 93 N. Y. 592; Moore v. Chicago, R. I. & P. R. Co., 43 Iowa, 385; Mooney v. U. P. R. Co., 60 Iowa, 346; German Bank v. American F. Ins. Co., 83 Iowa, 491; Neufelder v. German A. Ins. Co., supra; Railroad v. Barnhill, supra; Burlington & M. R. R. Co. v. Thompson, 31 Kan. 180; dissenting opinion in Missouri P. R. Co. v. Sharitt, 43 Kan. 375; National F. Ins. Co. v. Chambers, 53 N. J. Eq. 468; East Tenn., V. & G. R. Co. v. Kennedy, 83 Ala. 462; Pomeroy v. Rand, 157 Ill. 176; Roche v. Rhode Island Ins. Assn., 2 Ill. App. 360; Wabash R. Co. v. Dougan, 142 Ill. 248; Stevens v. Brown, 20 W. Va. 450; Mineral P. R. Co. v. Barron, 83 Ill. 365; Morgan v. Neville, 74 Pa. St. 52; Hannibal & St. J. R. Co. v. Crane, 102 Ill.

249; *Glover v. Wells*, 40 Ill. App. 350; *Selma, R. & D. R. Co. v. Tyson*, 48 Ga. 351; *Campbell v. Home Ins. Co.*, 1 Rich. N. S. 158; *Green's Bank v. Wickham*, 23 Mo. App. 663; *Connor v. Hanover Ins. Co.*, 28 Fed. 549; *Chicago, B. & Q. R. Co. v. Moore*, 31 Neb. 629; *Singer Mnfg. Co. v. Fleming*, 39 Neb. 679; *National Bank v. Huntington*, 129 Mass. 444; *Cousens v. Lovejoy*, 81 Me. 467; *Nichols v. Hooper*, 61 Vt. 295; *Rood, Garn.* §§ 233, 245, 246.

CANTY, J.

The defendant, a resident of North Dakota, insured his house against loss by fire in the garnishee insurance company, a foreign corporation organized in England. The house was situated in North Dakota, and was burned while so covered with said insurance. Thereupon the plaintiff, a resident of this state, brought an action against defendant to recover an indebtedness due from the latter to the former, and instituted garnishment proceedings against the insurance company, which was doing business in this state. The garnishee appeared, and disclosed that it owed the defendant the insurance money due on said loss, amounting to \$800. The defendant could not be found in the state, and the summons in the main action was served on him by publication. The garnishee summons was served on the garnishee by delivering copies thereof to the insurance commissioner, pursuant to Laws 1895, c. 175, § 77. The plaintiff moved for judgment on the disclosure of the garnishee. The defendant appeared specially, and moved that the proceedings be dismissed on the ground that the court had no jurisdiction. Both motions were heard together. Defendant's motion was denied, and plaintiff's was granted. From the judgment entered thereon in plaintiff's favor, defendant appeals.

This is a proceeding in rem. *Aultman, Miller & Co. v. Markley*, 61 Minn. 404, 63 N. W. 1078. The res is the indebtedness due from the garnishee to the defendant.

Appellant contends that the court had no jurisdiction, and the judgment is void, because the situs of the debt was not in this state, and therefore the courts of this state could not seize or condemn it. There is a conflict of authority as to whether, under the circumstances, the debt has a situs in this state. In the discussion of this

question, we must keep in mind two simple principles: First, as between different states or sovereignties, the situs of the debt is at the domicile of the creditor (Wharton, Conf. Laws [2d Ed.] §§ 359, 363; Story, Conf. Laws [8th Ed.] § 399; Brown, Jur. § 150); second, statutes and the custom of London may, and often do, for the purposes of attachment or garnishment at the suit of a third person, give the debt a situs also at the domicile of the debtor.

Respondent contends that the debtor (the garnishee herein) has a domicile in this state. Said section 77 provides:

“No foreign insurance company shall be so admitted and authorized to do business until: * * * Third. It shall by a duly executed instrument filed in his office constitute and appoint the insurance commissioner or his successor its true and lawful attorney upon whom all lawful processes in any action or legal proceedings against it may be served, and therein shall agree that any lawful process against it which may be served upon its said attorney shall be of the same force and validity as if served upon the company, and that the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this state.”

The garnishee has filed such a stipulation, has established local agencies, and has been insuring property in this state. This did not, in our opinion, give the garnishee a domicile in this state for all purposes, or bring into this state the situs of debts which it owes elsewhere by reason of business transacted elsewhere. Neither the creditor nor the debtor resided in this state; none of the transactions out of which the indebtedness arose took place in this state; and the indebtedness was not payable in this state. Under these circumstances, the debt has not a situs in this state. *Reimers v. Seatco Mnf. Co.*, 37 U. S. App. 426, 17 C. C. A. 228, and 70 Fed. 573; *Douglass v. Phoenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938; *Renier v. Hurlbut*, 81 Wis. 24, 50 N. W. 783; *Louisville & N. R. Co. v. Dooley*, 78 Ala. 524; *Wright v. Chicago, B. & Q. R. Co.*, 19 Neb. 175, 27 N. W. 90; *Keating v. American R. Co.*, 32 Mo. App. 293. In *Green v. Farmers & C. Bank*, 25 Conn. 452, *Tingley v. Bateman*, 10 Mass. 343, and *Lawrence v. Smith*, 45 N. H. 533, it is held that a debtor who is only temporarily in the state cannot be charged as a trustee or garnishee. But we need not now consider whether

or not these decisions should be followed. The garnishee herein is not in the state temporarily. It is in the state permanently, or, for the purposes of this case, it is not in the state at all.

Respondent relies on *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 52 N. W. 905. That case is not at all parallel. The report of that case does not fully disclose the facts as they appear in the court's findings. One Zellar was employed as a conductor on the Great Northern Railway in running and operating its train from Minot, North Dakota, to Glasgow, Montana, and during the time of his employment resided at Glasgow. On October 23, 1891, he ceased to be so employed, and immediately thereafter changed his residence to Minot. Thereafter, on November 23, 1891, attachment proceedings were instituted against him in Montana by a resident of that state, and the wages due him from the railway company for his last month's services were attached, and process was served on him by publication. Thereafter, on December 4, 1891, he changed his residence to Minnesota, and assigned his claim for wages to Harvey, who commenced an action in Minnesota against the railway company for the amount of the claim. The railway company was incorporated under the laws of Minnesota; but, under the laws of Montana, a railway company doing business in that state could be served with process by serving the same on its ticket agent. This court held that the Montana court had jurisdiction to seize the debt, and ordered proceedings stayed in the action in this state until the determination of the attachment proceedings in Montana. Clearly this debt had a situs in Montana. The debt grew out of a Montana transaction between Zellar and the railway company, and was incurred in that state. For the purposes of that transaction, the railway company had a domicile in Montana, and the fact that Zellar subsequently left the state did not destroy such domicile of the railway company as regards that transaction, or destroy the situs of the debt in Montana for the purposes of attachment in that state.

It is true that this defendant might have brought an action in this state against this insurance company to recover for this loss, and might have obtained service by serving the summons on the insurance commissioner. But this does not prove that this debt

has always had a situs in this state. In the first place, that action would be in personam, not in rem; and, for the purposes of such an action, it is immaterial where the situs of the debt is. In the next place, the creditor, by his voluntary act, may give the debt a situs also at some place other than that of his domicile. He may, so to speak, take the debt with him for the purpose of bringing a suit upon it. But a third person claiming to be a creditor of such creditor cannot do this. Such a stranger has no power to change the situs of the debt, or to give it a situs at a place where it would not otherwise have it. In our opinion, the debt in question had no situs in this state, and the court below had no jurisdiction.

The judgment appealed from is therefore reversed, and the action remanded, with directions to dismiss the same.

A petition for reargument having been filed the following opinion was filed on June 17, 1898:

CANTY, J.

On a motion for a reargument, respondent calls our attention again to the fact that *Wyeth H. & M. Co. v. Lang*, 127 Mo. 242, 29 S. W. 1010, follows *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 52 N. W. 905, and overrules *Keating v. American R. Co.*, 32 Mo. App. 293, cited by us in the opinion herein. It is true that the *Wyeth* case purports to overrule the *Keating* case; but it merely overrules a dictum in the latter case, which dictum is to the effect that, when a debt is made payable at a certain place it has no situs at any other place. In our opinion, each of those cases was correctly decided on the facts.

The *Keating* case is similar to this case. Neither the defendant nor the garnishee resided in Missouri. The garnishee was an Illinois corporation, which did business also in Missouri and Texas. The defendant was a resident of Texas, where he was employed by the garnishee; and the plaintiff attempted to procure service on him by publication, and to garnish his wages. The plaintiff and defendant in the *Wyeth* case were both residents of Missouri. The latter had commenced a number of actions against the former in the state of Kansas, had garnished in those actions residents of Kansas who were debtors of the former, and had obtained service

on the former by publication. The Missouri action was brought to restrain the prosecution of the Kansas actions on the ground that the courts of Kansas had no jurisdiction. Of course, the Kansas courts had jurisdiction, and the Missouri action could not be maintained.

The statement, in the opinion in the latter case, that the debt may be attached as the property of the creditor wherever he might maintain an action to recover it, was merely a dictum, which is true as a general rule; but, as we hold in this case, there are some exceptions to that rule. The garnishee in this case is an English corporation, which may be doing business in every state in the Union, and also in England, Ireland, Scotland, Canada, India, Australia, and a score of other countries. If respondent's position is correct, the debt here in question has at one and the same time a situs in all of those states and countries in which the corporation is doing business, and may be seized by attachment or garnishment in any of them.

The petition for a reargument is denied.

MILWAUKEE HARVESTER COMPANY v. HENRY SCHROEDER.

May 31, 1898.

Nos. 11,024—(119).

72	393
81	516
72	393
85	189

Judgment by Default—Vacating.

Held, the court below did not abuse its discretion in setting aside a judgment by default, and allowing defendant to answer.

Appeal by plaintiff from an order of the district court for Norman county, Ives, J., opening a judgment in plaintiff's favor for \$495.20, and allowing defendant to answer. Affirmed.

Peter Sharpe and Ole J. Vaule, for appellant.

W. W. Calkins, for respondent.

CANTY, J.

This is an appeal from an order setting aside a judgment taken by default, and allowing the defendant to answer. The action is on a promissory note made to plaintiff, and signed by one Henry Schroe-

der. The summons was served on defendant March 23, 1897. Judgment was entered April 13, the motion to set it aside was made November 29, and heard December 13, 1897.

In his moving affidavit, defendant states that, prior to the service of the summons, the agents of plaintiff called on him a number of times with the note in question, and that he always informed them that he was not the Henry Schroeder who signed it, and that the latter was then living about two miles from defendant's residence; that, when the summons was served on him, he also notified the sheriff that he was the wrong man, and, about 20 days after such service, defendant called on plaintiff's attorney and informed him of these facts; that thereupon the attorney told defendant that he would write the plaintiff in regard to the matter; that defendant never took any further steps in the matter, and never knew that judgment was entered against him until about November 26, 1897, when he received a letter from said attorney informing him that the judgment had been entered; that he (defendant) never signed or executed the note, but that the same was signed by said other Henry Schroeder;

"That the reason this deponent did not answer in said cause or make any appearance therein was that he did not suppose judgment would be entered against him, for the reason that he was not the proper person to be sued, and he supposed that said mistake would be rectified without any appearance on his part and without putting this deponent to any expense or trouble therein; and that he supposed and believed that, under the circumstances, plaintiff could not under any circumstances take judgment against this deponent."

A counter affidavit of plaintiff's attorney was read on the motion, in which it is stated that on or about April 15, 1897, defendant came to the attorney's office, and was then informed by him that plaintiff intended to hold defendant for the payment of the judgment which had been docketed, but that the affiant would write plaintiff

"That said Schroeder claimed not to be the maker of said note, and if possible obtain authority from it [plaintiff] to make a discount on said judgment if the same was paid at once, and if possible obtain a release of said judgment."

It is to be gathered from the record that defendant is a farmer, not a business man. The court below was justified in finding that he was ignorant of the consequences of failing to answer, and that he supposed that a judgment could not be obtained against him if in fact he was not the man who executed the note. While the question is close, we cannot, under all the circumstances, say that the court abused its discretion in holding that defendant's neglect was excusable, and in setting aside the judgment, and allowing him to answer.

Order affirmed.

DANIEL McLANE v. ANTHONY KELLY.

May 31, 1898.

Nos. 11,092—(131).

Use and Occupation—Waiver of Trespass.

The owner of real estate cannot waive the tort, and sue a trespasser on contract for the value of the use of the premises, as if he were a tenant.

Contract for Sale of Land—Action by Vendee for Breach—Counterclaim.

In an action by the vendee against the vendor for damages for breach of the executory contract of sale, in being wrongfully ousted from the possession of the premises by the vendor, the defendant set up in his answer a counterclaim for the value of the use of the land for a period of time prior to the making of the contract, during which time the vendee wrongfully entered upon and occupied the land. *Held* not a proper counterclaim.

Appeal by defendant from an order of the district court for Hennepin county, Johnson, J., sustaining a demurrer to defendant's counterclaim. Affirmed.

Flannery & Cooke, for appellant.

John T. Byrnes and *M. C. Brady*, for respondent.

CANTY, J.

The complaint alleges that on August 13, 1895, the defendant was the owner in fee of certain described real estate in Swift coun-

ty, and on that day entered into an executory agreement with plaintiff to sell the same to him, and that he agreed to pay therefor the sum of \$1,975.50,—\$500 in 15 days from that date, and the balance at later dates; that he went into possession, and thereafter on September 11, 1895, paid defendant the sum of \$250 on such first payment, and that thereafter on November 18, 1895, defendant wrongfully took possession of the premises, and ousted plaintiff, without his consent. The prayer is that plaintiff have judgment for \$250, the sum so paid.

Defendant in his answer admits the agreement to sell the land to plaintiff, and denies that plaintiff ever took possession or ever paid any part of the purchase price, or ever performed any part of the contract. As a counterclaim, it is alleged that, without the knowledge or consent of defendant, plaintiff wrongfully entered upon and took possession of said real estate in the year 1893, and wrongfully cultivated and raised crops on the same during the years 1893, 1894, and 1895, and that thereafter defendant took possession of the land;

"That the value of the use of said premises for said years 1893, 1894, and 1895 was and is the sum of \$960; * * * that defendant hereby elects to waive plaintiff's tortious entry and occupation of the premises aforesaid, * * * and to recover, as upon an implied contract, the value of the use of said lands during the time the same were so occupied by the plaintiff."

Plaintiff demurred to this counterclaim, on the ground that it does not constitute a defense or counterclaim, and defendant appeals from an order sustaining the demurrer.

1. It is well settled that the owner of real estate cannot waive the tort, and sue a trespasser on contract for the value of the premises, as if he were a tenant. *Commonwealth T. Ins. & T. Co. v. Dokko*, 71 Minn. 533, 74 N. W. 891, and cases cited.

2. Plaintiff's cause of action is for a breach of a contract. Defendant's cause of action is purely in tort, and cannot, under G. S. 1894, § 5237, be pleaded as a counterclaim in the action, unless it arose "out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim," or "is connected with the subject of the action." Clearly, it did not arise out of such contract or transaction. Neither is it connected with the subject of

the action, unless the fact that the real estate on which the trespass was committed is the real estate which was afterwards sold constitutes such connection. We cannot hold that it does. The fact that it is the same real estate is wholly immaterial, and the two causes of action are not so connected in subject-matter as to permit defendant to plead his cause of action as a counterclaim.

Order affirmed.

MELVIN J. CLARK v. B. B. RICHARDS LUMBER COMPANY and Another.

May 31, 1898.

Nos. 11,100—(208).

79	397
74	306
74	308
74	309

Second Appeal—Law of the Case.

The doctrine of "the law of the case" applied on a second appeal.

Conditional Sale—Waiver of Conditions by Action for Price—Title by Instalments.

Conceding, without deciding, that where the purchase price of goods sold on a contract of conditional sale becomes due, and the vendor takes security for such price, or brings suit for the same, he thereby waives the condition, and affirms the title absolutely in the vendee, *held*, such rule does not apply to this case, for the reason that the contract provided that the vendee could pay at a certain rate for a part of the property at a time, and thereby vest the title of such part in himself, and such agreed price for the portion of the property disposed of by the vendee exceeded the amount of his payments and the amount of the instalments of the price for which he had given such security, and for which the vendor had brought suit.

Action to Cancel Contract—Judgment for Foreclosure—Assignee in Insolvency of Vendee Cannot Object.

This action was brought by the vendor to cancel the contract of conditional sale for failure to perform the same, and the assignee in insolvency of the vendee was made a party. Instead of cancelling the contract, the trial court declared the balance due on the purchase price a lien on the balance of the property undisposed of. *Held*, as against the plaintiff, the assignee is not entitled to the property, is not concerned in whether a judgment of foreclosure or a judgment of cancellation is entered, and cannot raise the question on appeal.

Same—Deficiency Judgment—Proof in Insolvency—No Estoppel to Creditors.

Held, a judgment in this action for a deficiency after a foreclosure sale could not be proved in the insolvency proceedings, and the judgment in this action would not estop the assignee or creditors from disputing the validity of any such claim, in whatever form presented in those proceedings.

Action in the district court for St. Louis county against B. B. Richards Lumber Company and Duluth Trust Company, assignee for the benefit of creditors of the lumber company. From an order, Cant, J., denying a motion for a new trial, and also from a judgment in favor of plaintiff, defendant trust company appealed. **Affirmed.**

Dibell & Reynolds, for appellant.

Cash, Williams & Chester, for respondent.

CANTY, J.

This is the second appeal in this action. See 68 Minn. 282, 71 N. W. 389. After the decision on the former appeal, the case was remanded to the court below, was again tried, and the court again found for plaintiff. From an order denying a new trial, and from the judgment entered in plaintiff's favor, the defendant trust company again appeals.

An order denying a new trial was reversed on the former appeal because the trial court refused to find on a material issue. On the last trial the court found all of the facts found on the former trial, and, in addition thereto, found on said issue against this appellant, as follows:

"That said contract [of conditional sale] was filed by plaintiff in the office of the city clerk of the city of Duluth on the 24th day of September, 1896; that the sole reason why the same was not filed at an earlier date was that the plaintiff believed it was not necessary the same should be filed in order to protect his rights thereunder, and that there was no agreement at any time between the parties to said contract that the same should not be filed or that it or any of its provisions should not be made public."

The evidence sustains this finding, and this disposes of all the

questions raised on the former appeal and disposed of in the former opinion. That opinion has become the law of the case.

Appellant raises some additional questions.

2. Under the contract the purchase price fell due by instalments. An instalment of \$35,000 fell due December 1, 1895. It was not paid, and plaintiff received as security for the payment of the same several indorsed notes, and afterwards sued on some of these notes, attached property, and obtained judgment. Appellant cites cases which hold that, when the vendor in a conditional sale sues to recover the purchase price, or takes security, he thereby waives the condition, affirms the conditional sale, and thereby vests the absolute title in the vendee. Conceding, without deciding, that these decisions should be followed in a proper case, we cannot apply them here.

This contract of sale provides that the vendee shall have the right to pay for any lot or lots of lumber to be manufactured from the logs, in quantities of one million feet or upwards, at the rate of five dollars per thousand feet in 1895, and thereafter at the rate of six dollars per thousand feet; that "upon making such payment the title to the lumber so paid for shall pass unto and vest in" the vendee, and the amount paid shall be applied on the purchase price under the contract.

Under this contract the vendor could waive the condition, and affirm the absolute title of the vendee piecemeal. And by taking security for these instalments, and bringing suit to collect them, he has at most affirmed the title in the vendee to the amount of lumber and timber which these instalments would cover at the prices named. But the vendee disposed of lumber in 1895 and 1896, for which, according to the contract, it should have paid the vendor \$185,000, while it in fact paid him only \$40,250, and \$10,000 of this sum was for interest on the entire purchase price. In addition to this, the vendor gave the indorsed notes for the instalment of \$35,000, as aforesaid; but, counting them also as a payment, the total amount paid does not amount to more than \$75,000, or at least \$110,000 less than should have been paid to release the logs disposed of. Again, the correspondence between the parties shows that

they did not contemplate a waiver by plaintiff of his claim on the rest of the logs and timber.

3. The complaint asks that the contract of conditional sale be canceled for failure on the part of the purchaser to perform the same. It is alleged that the purchaser, the B. B. Richards Lumber Company, sold certain lumber held by it under the contract of conditional sale, and invested the proceeds in other property; and plaintiff also prays that a lien be declared in his favor on such other property for the amount so invested in it. In its conclusions of law the court denied plaintiff a lien on the latter property, and declared the sum due him for the purchase price of the property so sold on the conditional sale a lien on all of such property in the hands of the assignee, and ordered that all of that property, including all of the standing pine, be sold to satisfy the lien.

It is assigned as error that the court erred in granting "any relief upon the complaint herein other than a personal judgment against the B. B. Richards Lumber Company," and that "the court erred in not finding as a first conclusion of law that the plaintiff is entitled to recover only a personal judgment against defendant, the B. B. Richards Lumber Company," and that the court erred in not finding as a conclusion of law that appellant is the owner and entitled to the exclusive possession of the property. It is clear that none of these assignments of error are well taken, and that they do not reach the claim made on the argument that the court erred in ordering judgment giving plaintiff a lien on the property for the purchase price, and ordering the property sold to satisfy such lien.

But, even if the assignments of error were sufficient for that purpose, the appellant is not in a position to raise the question. If the plaintiff is not entitled to have the balance due on the purchase price declared a lien on the property, and the lien foreclosed, he is at least entitled to have the contract canceled, and to take the balance of the property for the balance of the purchase price. If this is true, the appellant, as assignee of the lumber company, has, in any event, no right to the property as against plaintiff; and it does not concern appellant whether the plaintiff takes the property in one form or the other. The lumber company might have an

interest in this question because a judgment for a deficiency after the sale on foreclosure might be entered against it, but the lumber company has not appealed. No such judgment can be entered against the assignee.

4. This action was commenced after appellant was appointed assignee of the insolvent lumber company, and for this reason, if for no other, such judgment could not be proved as a claim in the assignment proceedings, and no judgment in this action would estop the creditors or the assignee from disputing the validity of plaintiff's claim for such deficiency, in whatever form presented, if he should attempt to prove it in those proceedings. See *Danforth v. National Chemical Co.*, 68 Minn. 308, 71 N. W. 274, and *Buffum v. Hale*, 71 Minn. 190, 73 N. W. 856. Then appellant is not aggrieved.

This disposes of all the questions raised having any merit, and the order and judgment appealed from are affirmed.

In re TAYLOR CRUM.

June 1, 1898—July 11, 1899.

No. 11,227.

On May 19, 1898, Taylor Crum appeared before the State Board of Examiners in Law and made application for admission to practice as an attorney in the courts of Minnesota, presenting a certificate showing he had been a practicing attorney in North Dakota for more than five years. Thereupon the board voted that the applicant be notified it could not lawfully grant his application until the judgment of disbarment, rendered by the court of North Dakota, be removed or vacated or he be readmitted as an attorney of that state.

This action having been reported to this court, the following opinion was filed June 1, 1898:

PER CURIAM.

This is an application to be admitted to the bar of this court, un-

der rule 1 of the rules for admission to the bar, which reads as follows:

"Attorneys of five years standing from any other state or territory of the United States or from said District of Columbia may, in the discretion of the board, be admitted without examination, further than of the papers presented by them to the board."

It appears from the report of the board of law examiners that the applicant was at one time an attorney in the state of North Dakota, of more than five years standing, but that before he made this application he had been permanently disbarred by the judgment of the district court of Cass county, North Dakota, which judgment had been affirmed on appeal to the supreme court of that state. It necessarily follows that the applicant is not now an attorney of five years standing from any other state, territory, or the District of Columbia; hence he cannot be admitted under the provisions of rule 1. The fact that he is an attorney of the district and circuit courts of the United States for the district of North Dakota does not bring him within the rule.

Application denied.

Thereafter on April 22, 1899, a second application was made to the state board to admit him to the bar of Minnesota, and the applicant presented a certificate of the supreme court of North Dakota, dated April 18, 1899, of his readmission to practice in that state. A majority of the board being of the opinion that he could be admitted to practice in this state upon the documents presented, without study in the office of a practicing attorney in this state or examination, the applicant was so notified. A protest against his admission from members of the bar at Moorhead having been received by the secretary of the board, on May 18, 1899, the board heard the applicant in support of his application and certain attorneys who appeared upon behalf of members of the bar of Moorhead against the application. At the conclusion of the hearing the board voted unanimously to recommend to this court that the application be denied, and the fee paid by the applicant was returned to and accepted by him. This vote having been reported to the court, the following opinion was filed on July 11, 1899:

PER CURIAM.

This is an application of Taylor Crum to this court for admission to the bar of this state notwithstanding the adverse report by the State Board of Examiners in Law. It appears from the records and files that Crum applied to the board of examiners for admission to the bar of this state under Rule 1, and not otherwise, as an attorney of five years standing from the state of North Dakota. It also appears that he was admitted to the bar in that state as early as 1890, and continued to practice as attorney at law in all the courts of that state from that time until February 10, 1898, when by a judgment of the district court of Cass county in that state he was adjudged guilty of certain charges against him and disbarred, which judgment was on appeal affirmed by the supreme court of that state; that subsequently on April 18, 1899, the latter court made an order readmitting him as an attorney and counsellor at law in all the courts of that state, upon his taking the oath of office, but not reversing or modifying the judgment previously rendered against him.

Upon this state of facts we are of opinion that Crum is not an attorney of five years standing of North Dakota within the meaning of Rule 1. To be admissible under that rule the applicant must be an attorney of the state from which he came at the time of his application and have been such continuously for five years immediately preceding such application.

Application denied.

STATE OF MINNESOTA v. JOHN M. CURRIE.

June 2, 1898.

Nos. 10,958—(15).

Judgment—Erroneous Entry—Correction.

Where a judgment is entered by the clerk, not in accordance with the verdict, and without the order of the court, the remedy in the first instance is by proper application to the trial court to correct it.

Appeal by defendant from a judgment of the district court for Pine county. Affirmed.

Robt. C. Saunders, for appellant.

Fifield, Fletcher & Fifield, for respondent.

BUCK, J.

The state, as plaintiff, brought this action against the defendant, Currie, under G. S. 1894, § 7933, to recover a statutory penalty for retailing, compounding, and dispensing drugs, medicines, and poisons, contrary to the statute in regard to the regulation of the practice of pharmacy. Two causes of action were set out in the complaint, and a demand made for the statutory penalty of \$50 for each violation. The answer is a general denial. There was a trial by jury, which rendered a special verdict, the first subdivision being as follows:

"We do find that at the time and place alleged in the first cause of action set forth in the complaint herein said defendant did compound, dispense, vend, retail, and sell and deliver to said James H. Frost, in said cause of action named, the drugs, medicines, and poisons in said cause of action described."

The second and only other finding was favorable to the defendant. This constitutes the entire verdict, upon which the clerk without any order of the court entered judgment in favor of the state and against the defendant and his sureties, for the sum of \$50 and costs. From this judgment the defendant appeals.

This verdict upon its face is a nullity. It contains a finding as to only one of several material issues made by the pleadings, and entirely fails to find whether or not the plaintiff was entitled to recover any penalty against the defendant, as provided in the section of the statute which we have quoted. It should have found either by its special verdict sufficient facts warranting the entry of judgment therein either for or against plaintiff, or else a general verdict one way or the other, unless the jury disagreed. The one found is so incomplete and defective as to render it entirely insufficient upon which to base an entry of judgment against the defendant.

But the appellant is mistaken in his remedy. He should have applied in the first instance to the trial court for relief. Notwithstanding the numerous decisions of this court to this effect (some

of which are cited in respondent's brief), cases are frequently brought here involving the same question, imposing unnecessary expense upon the parties, and unnecessarily taking up the time of the court. Such practice should be avoided. The rule is fully stated by Justice Mitchell in *Bank of Commerce v. Smith*, 57 Minn. 374, at page 376, 59 N. W. 312, as follows:

"Whatever vacillation or uncertainty on the subject there may have been in the earlier decisions of this court, its uniform and inflexible rule for many years has been that, where the error or mistake is not that of the court itself but of the jury or the clerk, application must be made, in the first instance, to the trial court to correct it. This has been held in cases where the verdict was claimed not to be justified by the evidence; also, where the judgment entered by the clerk was not in accordance with the verdict or findings. The propriety of this rule is very apparent, because, presumably, if the trial court's attention was called to the matter, it would correct the error; and to allow a party to raise these questions on appeal to this court, without first applying to the trial court, would be to allow him to omit to resort to a very speedy and inexpensive remedy, which is very much in the nature of an intermediate appeal."

The judgment is affirmed, but without prejudice to the defendant to apply to the trial court to vacate and set aside the judgment.

CARL A. JOHANSON v. PIONEER FUEL COMPANY and Another.

June 2, 1898.

Nos. 10,998—(41).

Liability of Master—Tort of Servant.

In order to hold the master liable for the act of a servant in causing an injury to a third person, it must pertain to the duties which the servant was employed to perform.

Same—Course of Employment—Delivery of Coal.

P. F. C., a corporation, owned a coal dock in the city of Duluth, where it stored, cared for, and handled coal, which, in the course of its business, it sold and weighed to its customers. It employed M. to attend to this business, and he sold one ton of said coal to the plaintiff, who took part

thereof away at two different times. When he returned for the balance, M. charged plaintiff with having procured larger sacks than he formerly used, and that he was wrongfully attempting to procure more coal than he was entitled to, which plaintiff denied, whereupon M. became enraged, and assaulted the plaintiff, and greatly injured him. *Held*, that this assault was an independent tort, and not done in the course of his employment, and for which the defendant was not liable.

Appeals by plaintiff from an order of the district court for St. Louis county, Moer, J., sustaining the demurrer of defendant Pioneer Fuel Company to the complaint, and from a judgment in favor of said defendant. *Affirmed*.

John Jenswold, Jr., for appellant.

E. L. McMillan, for respondent.

BUCK, J.

The defendant Pioneer Fuel Company owned a coal dock within the city of Duluth, whereon it stored, cared for, and handled its coal, and from which, in the course of its business, it sold, weighed out, and delivered the same to its customers; and, in carrying on such business, it employed the co-defendant, McKee, who had sole charge and management thereof. On or about November 26, 1895, plaintiff purchased from and paid the defendant company for one ton of coal upon said dock, which it agreed to weigh and deliver to him from said dock, and agreed that said co-defendant, McKee, its servant, should attend to the matter on its behalf. In accordance therewith, the plaintiff proceeded to said dock with certain sacks and a wheelbarrow, for the purpose of having the said coal weighed out and delivered to him; and accordingly, and while upon said dock, so requested of McKee. Thereupon McKee filled the said sacks, and ascertained the weight thereof to be 620 pounds, which the plaintiff took away, and returned with the same empty sacks for more coal. Said sacks were again filled, but McKee refused to weigh the same, and compelled the plaintiff to receive their contents as of the same weight as before, whereupon the plaintiff took the coal away, and again returned with the same sacks to be again filled with coal, and so requested of McKee.

Thereupon McKee charged the plaintiff with having procured larger sacks than formerly, which the plaintiff denied, whereupon

McKee became abusive and enraged, and charged plaintiff with wrongfully attempting to procure more coal than that to which he was entitled; and he thereupon, and without any request to plaintiff to depart or cease his removal of said coal, did wilfully and unlawfully, and with force and arms, seize, assault, beat, and strike, and otherwise maltreat this plaintiff, and inflicted grievous bodily harm and injuries upon his person. As a result of the said injuries so received, the plaintiff was made sick and sore, and necessarily had to be, and was thereupon, confined to his house for a long time, during which period he suffered continued and severe bodily and mental pain and agony. That as a further result thereof, he has ever since said time been unable to work, or to follow his usual vocation, but lost his entire time.

These are substantially the allegations in the plaintiff's complaint; he also therein alleging that he was damaged in the sum of \$6,500, for which he demands judgment. The defendant Pioneer Fuel Company interposed a demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action against it, which was sustained, and plaintiff appeals.

Was McKee, when he made the assault upon plaintiff, acting in the line of his master's business and within the scope of his employment? Cases occasionally, perhaps frequently, arise where it is difficult to determine whether the act so done was properly chargeable to the master or was purely that of the servant. McKee had been acting for his master when he filled plaintiff's sacks with coal, and ascertained the weight thereof to be 620 pounds, and when he compelled plaintiff to take the sacks away, as being of the same weight as the former sacks of coal. But, when plaintiff returned the third time, he did not attempt to take any more coal, either by force or otherwise; and there was no danger of its being taken, or in any manner interfered with, by plaintiff. Nor was McKee attempting to compel plaintiff to take any or a less amount than he had bargained for.

The altercation arose as to the alleged act of plaintiff, whereby McKee charged him with having procured larger sacks than those which he had previously used. The refusal to furnish more coal in the sacks which plaintiff brought on his last trip might possibly

be considered an act in furtherance of the master's interest, because he probably thought plaintiff was attempting a dishonest act to the master's disadvantage. That refusal evidently ended the business relations between them. Then arose the question of honesty and veracity,—not as between plaintiff and the fuel company, but as between plaintiff and McKee; and the assault was not intended by the latter to aid his master's business, nor could it in any manner have that effect. It was purely a personal matter between plaintiff and McKee, and it was this quarrel which led to the assault,—an act done outside of the scope of McKee's employment. Suppose that, on a day subsequent, these parties had met at some other place, and the same charges had been made by McKee, and denied by plaintiff, and this altercation had resulted in a similar assault upon plaintiff by McKee; could it be reasonably said that the latter was then acting in the line of his master's business, or in the scope of his employment? And, if not, then the master would not be liable.

The time and place of the transaction in this case do not constitute the test of the master's liability. In order to hold the master liable, the act causing the injury must pertain to the duties which the servant was employed to perform. When the relation of master and servant ceases, all liability for the act of the persons employed ceases also. *Wood, Mast. & Serv.* 538. And the test of liability of the master depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it. *Id.* 535. We hold that the assault by McKee upon plaintiff was an independent tort, for which the Pioneer Fuel Company was in no way liable, that the bald statement in the complaint that it was done by the servant while in the course of his employment is not, taken in connection with the other facts stated in the complaint, sufficient to charge the master. *Campbell v. Northern Pac. R. Co.*, 51 Minn. 488, 53 N. W. 768.

Judgment affirmed.

LAIRD, NORTON COMPANY v. COUNTY OF PINE and Another.

June 2, 1898.

Nos. 11,035—(67).

72	409
86	806

Collection of Personal Tax—Injunction.

A suit in equity will not lie to restrain the collection of a personal tax on the sole ground that it is illegal.

Same — Allegations of Complaint — Irreparable Injury — Adequate Remedy at Law.

Held, also, that the complaint did not contain sufficient allegations of traversable facts to show that an irreparable injury would result to the plaintiff to entitle it to go into a court of equity for the enforcement of the relief prayed for, nor that it did not have an adequate remedy by proceedings at law.

Appeal by defendants from an order of the district court for Pine county, Williston, J., overruling defendants' demurrer to the complaint. **Reversed.**

The fourth paragraph of the complaint, referred to in the opinion, was as follows:

"Fourth: This plaintiff further alleges that on the first day of April, 1896, a warrant for the collection of said tax was placed in the hands of the sheriff of said Pine county, the above-named defendant James McLaughlin. That this plaintiff now has a large quantity of logs in said Kettle river and Sand and Bear creeks within the limits of Pine county aforesaid, and that said defendant James McLaughlin threatens to levy upon said logs to collect said pretended tax; that said logs are situate in and along said Kettle river and said creeks, and are so intermixed and intermingled that in order to enable the defendant McLaughlin to levy upon a sufficient number to realize the amount of said warrant, it would be necessary to levy upon a quantity of logs in value several times in excess of said sum. That this plaintiff now has logs in and along said Kettle river and Sand and Bear creeks within the county of Pine of the value of not less than \$50,000, and that said logs are so intermixed and intermingled that said sheriff, if he makes said levy in good faith, would be obliged to levy upon logs in the aggregate of the value of not less than \$50,000; that said levy would detain said logs and prevent this plaintiff from driving the same down said Kettle river and said creeks. That said Kettle river and said creeks are navigable for logs only at high water, and that the logs

of this plaintiff can only be driven down said Kettle river and said creeks by taking advantage of the high water in said river in the spring time, and that to levy upon said logs would not only be to detain a quantity sufficient to satisfy said warrant, but a quantity vastly in excess thereof, and that this plaintiff would not only be unable to take advantage of the high water and drive said logs to the Mississippi river at this season, but that said logs having been partially damaged by fire, the same will greatly deteriorate in value, unless speedily manufactured into lumber; and the levy and detention of said logs would be to render the same almost worthless, and would be a great and irreparable injury to this plaintiff, for which this plaintiff has no adequate remedy by proceedings at law."

L. H. McKusick and Robt. C. Saunders, for appellant.

Counsel cited *Clarke v. Ganz*, 21 Minn. 387; *Bradish v. Lucken*, 38 Minn. 186; *Clarke v. County of Stearns*, 47 Minn. 552.

Clapp & Macartney, for respondent.

The tax is void, and the town of Hinckley had no jurisdiction whatever to assess the same. G. S. 1894, § 1516; *State v. Clarke*, 64 Minn. 556; *Clarke v. Board of Co. Commrs.*, 66 Minn. 304; *Minneapolis & N. E. Co. v. Board of Co. Commrs.*, 60 Minn. 522. The complaint alleges traversable facts sufficient to show irreparable injury, and to entitle plaintiff to an injunction. *Gould, Waters*, § 500; *Troe v. Larson*, 84 Iowa, 649; *Musch v. Burkhart*, 83 Iowa, 301; *Wilson v. Mineral Point*, 39 Wis. 164; *Jones v. Brandon*, 60 Miss. 556; *Com. v. Pittsburg, etc., R. Co.*, 24 Pa. St. 159; 1 *Pomeroy*, Eq. Jur. § 357.

BUCK, J.

Appeal from an order overruling a demurrer to the plaintiff's complaint.

The plaintiff is a corporation engaged in the business of manufacturing and selling lumber at the city of Winona, that being its principal place of business, and where its sawmills, factories, and its offices are located and its entire manufacturing business and selling of such manufactured product are done. In 1894 a great fire in the county of Pine partially destroyed a vast amount of timber therein belonging to plaintiff, of which the logs mentioned in the complaint were part, whereby it became necessary for plain-

tiff to cut and dispose of the same at once; and, to this end, the plaintiff in 1895, while engaged in said business, cut a large quantity of pine logs in said county, with the intention and for the sole purpose of floating them down the tributaries of the Mississippi, and down said river from said county, to the said city of Winona, to be sawed and manufactured into lumber by the plaintiff, said logs so cut amounting to about fifty million feet.

In said year 1895, after said logs were cut, and while in said tributaries of the Mississippi river to be floated to Winona, as aforesaid, the assessor of the town of Hinckley, in said county, threatened to assess and list for taxation as personal property said pine logs then in said streams; and plaintiff, having notice thereof, objected against any such assessment being made, upon the ground that said logs pertained to the business of a manufacturing plant, the business of this plaintiff, and that said business was by it carried on at said city of Winona aforesaid, and that the said logs were not subject to be listed and assessed in the said town of Hinckley, in said county of Pine; whereupon plaintiff was notified that the matter would be referred to the attorney general of the state, and that his decision thereon should be communicated to plaintiff, but no such proceeding was had, and the first intimation that said logs were assessed in said town of Hinckley was a receipt of notice from the county treasurer of Pine county on January 15, 1896, advising plaintiff of said assessment, levy, and return of said tax, and requesting this plaintiff to pay the same, which it did not do.

On April 1, 1896, a warrant for the collection of said tax was placed in the hands of the sheriff of Pine county, the above-named defendant James McLaughlin, and he threatens to levy upon said logs to collect said tax, which logs were at that time in the tributaries of said Mississippi, to be by plaintiff floated down said streams to said city of Winona. The plaintiff prays judgment that the tax be adjudged null and void, and for an injunction restraining the collection of said tax. Two demurrers—one by Pine county, and one by the defendants jointly—were interposed by the defendants, upon two grounds, viz. that there was a defect of parties defendant, and that the complaint does not state facts sufficient to

constitute a cause of action. The trial court overruled the demurrer of the defendants, and they appeal.

The main ground of defendants' attack on the ruling of the trial court is that an equitable action does not lie to enjoin the collection of a personal property tax; that the plaintiff had an adequate remedy at law to resist the assessment and collection of this personal property tax complained of, and having failed to avail itself of said remedy, an injunction does not lie in its favor against the state to restrain the collection of said taxes.

Under G. S. 1894, § 1516, and the decisions of this court, the personal property pertaining to the business of a merchant or a manufacturer shall be listed in the town or district where his business is carried on. *State v. Clarke*, 64 Minn. 556, 67 N. W. 1144. Where a person has property absolutely exempt from taxation, he has a right to assume that the law will be observed, and he is not required to take notice of its illegal assessment. If in this respect his rights are disregarded, the law is not so oppressive as to deny him a remedy; but, as a general rule, courts guard against a judicial interference with the governmental and executive functions of taxation, and refuse to grant equitable relief by injunction. Perhaps there may be exceptional cases where any other remedy would be imperfect, and an injunction will issue. But this rule is more usually applied to cases of illegal assessments of real estate, where the assessment becomes an apparent lien upon the property, and a cloud upon the title, or where such remedy would avoid a multiplicity of suits. In this case the remedy sought is to set aside an assessment of personal property of a single corporation, and not even the question of a multiplicity of suits is involved.

This proceeding in respect to personal property is one in personam, and not in rem. This court has heretofore held that where the plaintiff has an adequate remedy at law, and no irreparable injury is threatened, the plaintiff cannot require the interposition of the court by injunction to restrain the collection of a personal tax. *Bradish v. Lucken*, 38 Minn. 186, 36 N. W. 454. And in *Clarke v. Ganz*, 21 Minn. 387, it was held that an injunction will not lie to restrain the collection of taxes on personal property merely because the tax is illegally levied, but there must be some special circum-

stances bringing the case within some recognized head of equity jurisprudence, such as that the plaintiff will be without an adequate remedy at law, or that such remedy will be practically valueless.

While the plaintiff in its complaint alleges that such levy and sale of the logs would be a great and irreparable injury to the plaintiff, for which it would have no adequate remedy by proceedings at law, this allegation must be deemed a conclusion of law, and not a state of facts warranting the application of the exceptional rule. As was stated in the opinion last cited, "in the complaint traversable facts must be alleged, to show that such will be the result of the taking." It is true that the complaint alleges that the plaintiff resides in the city of Winona, where it is a manufacturing concern, and that the logs were there assessable, and not in the town of Hinckley, and that the assessor of said town had no jurisdiction to make such assessment. But it is fairly inferable from all the allegations in the complaint that these logs were assessed in said town of Hinckley by the assessor of said town, and that the proceedings to enforce the collection of the same, including the issuing of the warrant to the defendant sheriff, were upon their face regular and valid, and the question of the jurisdiction of the assessor to make the assessment is one which depends on facts dehors the assessment proceedings.

Nor are there any facts pleaded which show that the plaintiff would suffer irreparable injury. The demand in the warrant is only one for the collection of money as a tax on personal property. Merely because the collection of the tax by sale of the logs would occasion a loss to the plaintiff is not what is known in the law as "irreparable injury." If so, all collections of money demands by judgment and execution might be placed in this category. It is not alleged that either defendant is irresponsible or insolvent, and, if the money is collected and paid over to the county treasurer of Pine county, there need be but little apprehension but that it can be collected back if it should be decided that plaintiff is entitled thereto.

If, upon a final trial, it should be found that the very groundwork for this assessment is wanting,—that the whole proceedings were invalid for want of jurisdiction,—the plaintiff might doubtless

pay the tax money under protest, and at once sue for and recover it. This may seem to be a vain and useless proceeding, but the law is too well settled for us now to hold otherwise than that equity has no jurisdiction to restrain the collection of this personal tax, even conceding it to be illegal. Such is the doctrine laid down in *Youngblood v. Sexton*, 32 Mich. 406, where the opinion was written by Judge Cooley, and, in support of his opinion, he cites the decisions of the courts of thirteen different states. This is the law also of the United States supreme court. See *Dows v. City*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 547.

The respondent concedes that as a general proposition an injunction will not issue to restrain the collection of a tax, especially upon personal property, but asserts that the allegations in the fourth subdivision of the complaint are sufficient to take the case out of the general rule showing that irreparable injury and damage would result to the plaintiff. The assessment, however, in this case, did not create a lien upon the personal property, or a cloud upon its title, and only involves a personal liability of the party, and it nowhere appears by any alleged traversable facts that an irreparable injury is threatened for which it had no adequate remedy at law. We find no precedent for such an equitable interference with the collection of personal taxes, and plaintiff fails to present a case warranting the maintenance of this action.

There is no merit in the point raised by appellant that there is a defect of parties defendant. Both defendants are seeking to enforce the collection of this tax by a warrant in the hands of the sheriff, and to be recovered for the benefit of the county of Pine. They are therefore both proper, if not necessary, parties, and the complaint in this respect is therefore not demurrable.

But upon the other point the order must be reversed. So ordered.

STATE OF MINNESOTA v. JOHN NESTAVAL.

June 2, 1898.

Nos. 11,107—(20).

72	415
73	102

Bastardy — Credibility of Complaining Witness and Defendant — Charge of Court.

In bastardy proceedings it is fatal error for the court to instruct the jury that, "so far as the pecuniary interest in the result of this suit is concerned, the complainant and the defendant are not equal, the defendant having a direct pecuniary interest in it, and the complainant having none." Their credibility as witnesses was exclusively for the jury.

Appeal by defendant from an order of the district court for Le Sueur county, Cadwell, J., denying a motion for a new trial. Reversed.

Charles G. Kolars, for appellant.

P. J. Kirwin, County Attorney, for respondent.

BUCK, J.

The defendant, Nestaval, was arrested upon the complaint of Mary Mach, an unmarried female, charging him with being the father of an unborn child, with which she was pregnant, and which, if born alive, would be a bastard. The proceeding was had under G. S. 1894, c. 17. The trial from which this appeal is taken was had before a jury in the district court of Le Sueur county. The defendant denied the charge in the complaint, but was found guilty by the jury, and he moved to set aside the verdict and for a new trial for errors of law occurring at such trial. This motion was denied by the court.

The error alleged arises upon that part of the charge which is as follows:

"Another consideration which you may properly take into consideration is what motive a witness may have for testifying falsely so far as it appears from the evidence in the case; and one motive which is sometimes an inducement to misrepresent is the pecuniary interest which a witness may have in the result of the suit. That is one motive which may actuate and prompt men and women to make false statements and give untrue testimony. So far as the pecuniary interest in the result of this suit is concerned, the com-

plainant and the defendant are not equal, the defendant having a direct pecuniary interest in it, and the complainant having none. I do not mean by what I have stated as to the pecuniary interest of the complainant and the defendant to instruct you that the complainant has told the truth, and the defendant has told an untruth, or the reverse. I leave it to your judgment. It is a matter solely for your judgment. I simply call your attention to the motive which the defendant might have. So far as the pecuniary interest is concerned, in the result of this suit the parties do not stand equal."

At common law the putative father is under no legal liability to support his illegitimate offspring. Schouler, Dom. Rel. § 279; 3 Am. & Eng. Enc. (2d Ed.) 889. And, as against the mother of a bastard child, the putative father has no legal right to its custody, but the mother, as its natural guardian, is entitled to its control, and is bound to maintain it. 3 Am. & Eng. Enc. (2d Ed.) 889, and authorities there cited. In contemplation of the common law, an illegitimate child was designated as *nullius filius*, son of no one, and therefore had no father who was bound to support it or could rightfully claim its care and custody. The sworn father is called the "putative father" because he is supposed to be the father of the illegitimate child; but there can be no doubt as to who is the mother, and hence the mother, as guardian by nurture, has the right to the custody and control of her bastard child until it shall have attained an age when, in contemplation of the law, it can make an election between father and mother; but in the meantime the legal obligation of supporting it devolves upon the mother. This, of course, involves a pecuniary responsibility. Board and clothing must be furnished, lest the unfortunate child suffer, and the maternal instincts of the erring mother lead her to care and provide for her illegitimate offspring.

The statute law, more humane in its provisions than the common law, aids her in this respect. It is true that the statute makes the putative father one in law for a particular purpose, viz. for the indemnity of society against the expense of the support of the child, and upon complaint of the mother or certain designated public officers an inquiry may be had as to the identity of the putative father, and upon sufficient proof he may be adjudged to pay a cer-

tain amount in support of his illegitimate child, or be imprisoned in default thereof. G. S. 1894, § 2041, provides:

"If such accused person pays or secures to be paid to the female complaining such sum of money or other property, as she may agree to receive in full satisfaction and as is approved by the commissioners of the county, of which agreement and approval the justice shall make a memorandum upon his docket, and shall also pay all expenses, if any, incurred by such county for the lying-in, and support and attendance upon the mother of such child during her sickness, and the costs of prosecution, and shall also give bond with sufficient sureties, to be approved by the justice, to the commissioners of the county in which such female resides, and their successors in office, conditioned to secure and indemnify such county from all charges for the maintenance of the child born or that may be born, the justice shall discharge such accused person."

If the trial is in the district court, and the accused is found guilty, he shall be adjudged to be the father of the child, and be charged with the maintenance thereof in such sum or in such manner as the court may direct. G. S. 1894, § 2044.

It was decided in *State v. Zeitler*, 35 Minn. 238, 28 N. W. 501, that the trial court might make a reasonable allowance for the past as well as the future maintenance of the child, including lying-in expenses, to be paid the mother for her use when not paid or incurred by the public. If the accused refuses to give a bond for the performance of such judgment or order, he may be imprisoned; but after 90 days' imprisonment, on verified petition that he is unable to comply with such order or judgment, he may be discharged from such imprisonment; but by section 2049 of such statute the mother of such child may, at any time after the discharge of such prisoner, recover by action any sum of money which ought to have been paid to her by him in pursuance of such judgment and order of the court. Now, with these rights, duties, and obligations pertaining to the mother and father of a bastard child, how can it be reasonably said that the complaining mother has no pecuniary interest in the result of the suit. One of the objects of the statute is to compel him to pay to her such sum of money or other property as she may agree to receive in full satisfaction. Such is the language of the statute. And he must pay her for her use, not only the lying-in expenses, but a

reasonable allowance for the past as well as the future maintenance of the child. So said this court in *State v. Zeitler*, already cited. And finally, after his discharge from imprisonment, she may sue him, and recover by action any sum which ought to have been so paid her by him.

No matter if the state is the proper party plaintiff, and the one which is seeking to enforce upon the putative father of a bastard child a duty to maintain and furnish it adequate support and indemnify it against its becoming a public charge. Whether her testimony is voluntary or enforced is of no consequence. If it helps the state in its protective policy and police power, she is, under the statute, entitled to its benefit, which provides for her reimbursement for her past expenses and future maintenance of her bastard child. But, as a witness, she comes before the court in no better and no worse position than the accused. He is seeking to avoid a pecuniary liability, and she is seeking to enforce one, or, at least, is testifying to a state of facts which, if believed by the jury, entitles her to do so. If the state succeeds, she gets the money or property in part, and is relieved from the support of the child. His loss is her gain. This makes her interest a direct pecuniary one.

It is not a question as to who is or ought to be a party plaintiff. The proceeding in this respect is fixed by the laws of the state. The consideration recovered against defendant in the name of the state or by its action does not belong to the state. It is not a speculative creditor, seeking to recover a debt, money, or property which shall become a state fund, but the amount recovered goes directly to the mother of the child for her past expenses in the matter, and for future expenses of maintenance of the child. She is presumed to know the law in this respect, and with this knowledge she goes upon the stand as a witness, and this pecuniary interest may affect her credibility as much as though she was a party plaintiff. Even if she were such party, and hence strictly a party in interest, in form and in fact, she could not be any more interested in the sum to be recovered than she would be when a witness. In either case she has a direct pecuniary interest in the result. The pecuniary motive or inducement therefore, on her part, to testify strongly

against the defendant is fully as great when she is a witness for the state as it would be if she were a party herself.

The proceeding is a civil, and not a criminal, one. It is true that the defendant may be imprisoned if he does not pay the judgment rendered against him, but this is not done as a punishment for a public offense, but by reason of his neglect or refusal to pay a pecuniary liability imposed by the order or judgment of the court, and which, if not paid, might leave the public chargeable with the necessary support of the illegitimate child. But neither the common law nor statute law permits the mother of a bastard child to sue the putative father as plaintiff in her own name in the first instance, for its support, even if she so desires. The humane legislative enactment steps in, and does for the mother and bastard child what the rigor of the common law would not permit. It provides that the unfortunate minor bastard child shall be supported by its putative father, and he be compelled to do so; but when it institutes an action in its own name, and for the benefit of the public, and at the same time gives to the mother, as its complaining witness, a substantial part of the sum or property recovered, it cannot be heard to say that such witness is not pecuniarily interested.

It is right that she should have a direct pecuniary interest in compelling the putative father to support such bastard child. But he should not be made liable upon an erroneous theory of the law or charge of the court as to the credibility of the complaining witness and defendant, by its saying in this respect they do not stand upon equal terms. Now, when the court charged the jury that, "so far as the pecuniary interest in the result of this suit is concerned, the complainant and the defendant are not equal," he clearly invaded the province of the jury. Even if their pecuniary interests were somewhat different in the result of the suit, still the credibility of each was in this respect a question of fact for the jury to determine. In the recent case of *Roberts v. State*, 84 Wis. 361, 54 N. W. 580, the supreme court of Wisconsin held that in bastardy proceedings it is a fatal error for the court to instruct that the complaining witness and defendant are not of equal credibility, as the matter is exclusively for the jury.

The error in the charge of the court was not cured because there

was evidence corroborating that of the complaining witness. It was not the duty of the jury to count the number of witnesses, and render a verdict in accordance with the majority of them, but to weigh the testimony, and render a verdict accordingly. *Van Doran v. Armstrong*, 28 Wis. 236.

The cases of *McClellan v. State*, 66 Wis. 335, 28 N. W. 347, and *Kenney v. State*, 74 Wis. 260, 42 N. W. 213, are cited by respondent in support of his contention that in bastardy proceedings the mother and the defendant are not of equal credibility as witnesses, the latter having a pecuniary interest in denying the paternity of the child. We have carefully examined those decisions, and, while they bear out the contentions of the respondent, the reasoning by which such results are arrived at is entirely unsatisfactory, and we think unsound.

Order reversed.

EDWIN H. HALL and Another v. WILLIAM SAUNTRY and Others.

June 2, 1898.

Nos. 11,152—(118).

Judgment—Collateral Attack.

In an action where the court has jurisdiction over the parties and the subject-matter, a judgment therein rendered cannot be impeached collaterally.

Judgment against Record Owner Valid against Grantee of his Unrecorded Deed—*Berryhill v. Smith*, 59 Minn. 285, Followed.

Berryhill v. Smith, 59 Minn. 285, followed, to the effect that, under G. S. 1894, § 4180, "every such conveyance [of real estate] not so recorded shall be void * * * as against * * * any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance," applies to a judgment affecting the title to real property, where such title appears of record in the name of the person against whom the judgment is returned.

Refusal to Make Findings—Error.

The trial court refused to make findings as to material issues. *Held* error.

Appeal by plaintiffs from an order of the district court for Itasca county, Holland, J., denying motions to amend the findings, for a new trial, and for judgment in favor of plaintiffs. Reversed.

Keyes & Baldwin, for appellants.

A. T. Ankeny and Clapp & Macartney, for respondents.

BUCK, J.¹

Hall and Brown brought this action for the purpose of determining the adverse claims of the defendants to a quarter section of land situate in Itasca county. William Sauntry and wife, Frederick Weyerhaeuser and wife, and E. Rutledge and wife answered, alleging title in F. Weyerhaeuser and William Sauntry. The trial court found the following facts:

(1) "That one Pierre Paul entered the land described in the complaint at the United States land office in Duluth, Minn., on the 6th day of October, A. D. 1873, to whom a patent was issued therefor, dated May 15, 1874, and duly recorded on the 30th day of October, 1883, in Book G of Deeds, on page 9; that the title acquired by said Pierre Paul under said entry and patent was duly conveyed to and vested in one James R. Park by warranty deed, dated October 25, 1873, and duly recorded on the 15th day of November, 1873, in Book C of Deeds, on page 159; that thereafter the title so acquired by said James R. Park was duly conveyed to and vested in the Cloquet Lumber Company by and through a warranty deed, dated May 25, 1889, and duly recorded on the 18th day of June, 1889, in Book D of Deeds, on page 212; and that the title so acquired by said Cloquet Lumber Company was duly conveyed to and vested in the said defendant E. Rutledge by and through a warranty deed, dated August 23, 1893, and duly recorded on the 1st day of December, 1896, in Book O of Deeds, on page 339; and that the undivided two-thirds of the title so acquired by said defendant E. Rutledge was thereafter duly conveyed to and vested in the said defendants William Sauntry and F. Weyerhaeuser."

(2) "That the Pierre Paul who entered said land, and to whom the patent issued therefor, died in Hennepin county, Minn., in the year 1887, and was, at the time of his death, about 87 years old; and that said Pierre Paul, at the time of his death, and for 25 years prior thereto, was a resident of Hennepin county."

(3) "That the plaintiffs claim title to the land in question under a quitclaim deed from another Pierre Paul; that the Pierre Paul under whom they claim title never resided in Hennepin county, never entered the land in question, nor authorized anyone to enter

¹ COLLINS, J., absent.

it for him, and was always an entire stranger to such title; that the last-named Pierre Paul is about 66 years old, and that he never personally received any consideration from plaintiffs for the conveyance to them of such land."

And, as a conclusion of law, the court found that the defendants were the owners in fee simple of the land described in the complaint, and that plaintiffs have not, and never had, any right, title, or interest in said land, or any part thereof; and it was ordered that judgment be entered accordingly. Plaintiffs appeal and assign a large number of errors, only part of which need be considered.

The alleged errors numbered 1 to 6, inclusive, are made upon the ground that the trial court refused to make any finding as to

(1) "Whether a person by the name of Pierre Paul commenced an action in the district court in and for Itasca county, Minnesota, against the Cloquet Lumber Company, in which action said Pierre Paul claimed to be the owner of the land in the complaint herein described and prayed to have the title to said land adjudged to be in him, said Pierre Paul, and to have the rights of said Cloquet Lumber Company adjudged and determined."

(2) "Whether judgment was rendered in said action of Pierre Paul against said Cloquet Lumber Company adjudging said Pierre Paul to be the owner of said lands."

(3) "Whether a certified copy of said judgment was recorded in the office of the register of deeds of said Itasca county, Minnesota, and at what time said certified copy was so recorded."

(4) "Whether, at the time of the commencement of said action of Pierre Paul against said Cloquet Lumber Company, the deed from the said Cloquet Lumber Company to E. Rutledge was recorded."

(5) "Whether, at the time said judgment was rendered in said action of Pierre Paul against said Cloquet Lumber Company, said deed from said Cloquet Lumber Company to E. Rutledge was recorded."

(6) "Whether, at the time a certified copy of said judgment rendered in said action of Pierre Paul against said Cloquet Lumber Company was recorded, the deed from said Cloquet Lumber Company to E. Rutledge was recorded in said county."

Upon all these points or questions there was ample evidence to require a finding of the trial court, which finding was necessarily material to the rights of the plaintiffs, but the court refused to make any finding upon any of said points or questions. We have quoted the entire finding of facts by the trial court.

The undisputed testimony shows that one Pierre Paul, Jr., commenced an action in the district court of Itasca county against the Cloquet Lumber Company. The summons and complaint therein are, respectively, dated January 28, 1895 (the time of service of the summons not appearing), and the answer is dated July 10, 1895. In the complaint Pierre Paul alleges that he is the owner in fee of the premises herein in dispute; that the lands are vacant and unoccupied; that defendants have, or claim to have, some interest in said land adverse to the claims of plaintiff; and prays that he be adjudged the owner in fee of said lands, free from any incumbrance or claim of defendants. The defendants answered, denying that plaintiff was the owner of said land, or that he had any interest therein; but defendants disclaimed any interest or estate in, or lien or claim on, said land. Upon a hearing of the action, September 10, 1896, in the district court of Itasca county, the trial court found that the material allegations of the complaint were true, and, as a conclusion of law, that the defendants had no right, title, or interest in the lands described in the complaint, and that plaintiff was entitled to judgment accordingly. On September 15, 1896, judgment was entered as ordered.

Thereafter, on September 25, 1896, Pierre Paul and his wife, by quitclaim deed, conveyed the premises to plaintiff Hall, which deed was duly recorded October 15, 1896, in the office of the register of deeds of said county of Itasca. Subsequently, and on November 30, 1896, Hall, by an instrument in writing, under seal and acknowledged, sold and transferred all the pine timber on said premises to the plaintiff Brown.

It thus appears from the foregoing facts that the Cloquet Lumber Company became vested with the title in fee to the premises on May 25, 1889, by deed from Parks, which deed was duly recorded June 18, 1889. This title remained in the Cloquet Company until August, 1893, when, by warranty deed, it conveyed said premises to E. Rutledge, who did not record said deed until December 1, 1896. It is to be noted that it was while E. Rutledge held his unrecorded deed from the Cloquet Lumber Company that Pierre Paul commenced his action against the company, had a trial thereon, and

judgment therein entered, as hereinbefore stated. This probably explains why the Cloquet Lumber Company disclaimed any ownership in the premises in its answer in the suit commenced against it by Pierre Paul, because it did not then own the premises, and had no interest therein; and it does not appear to have given Rutledge any notice of this action of Pierre Paul against it. In said action, the court appears to have had jurisdiction over the parties and of the subject-matter, and judgment was entered before Rutledge placed his deed upon record, and while the title of record stood in the name of the Cloquet Lumber Company.

It is conceded by these appellants, for the purposes of this appeal only, however, that the land in controversy was patented to Pierre Paul, the father of the Pierre Paul who was plaintiff in the case of Pierre Paul against the Cloquet Lumber Company, and the grantor of the plaintiff Hall in this action, and that the said company held the record title to the land through conveyances from the senior Pierre Paul. But the effect of the former judgment of Pierre Paul, Jr., against the Cloquet Lumber Company, was to establish the title to the premises in Pierre Paul, Jr., as against the Cloquet Lumber Company, in whose name the title then stood of record, and against Rutledge, who did not record his deed until after the judgment was entered, and the conveyances were made from Pierre Paul, Jr., to Hall, and from him to Brown, and these conveyances were duly recorded. Of course, Sauntry and Weyerhaeuser, the grantees of Rutledge, have no greater rights in the property than Rutledge had upon the entry of the judgment against him in favor of Pierre Paul, Jr.

The attack in this action upon the former judgment is purely a collateral one, and it cannot be successfully assailed in this manner. If the action had been a direct one by Rutledge against Paul, Jr., under G. S. 1894, § 5434, to set aside the judgment for fraud, or for any of the causes therein mentioned, a different question would have arisen; but here the attack is made and sought to be upheld as against the judgment rendered by a competent tribunal, where the plaintiffs are the privies of Pierre Paul, Jr., and the defendants privies of the Cloquet Lumber Company. But there is no essential element or material fact in the judgment record showing want of

jurisdiction in the court, which rendered judgment upon the merits. Such a judgment is not void. Thus we have a judgment lawfully obtained, so far as disclosed by the record, at the suit of a party against the person (Cloquet Lumber Company) in whose name the title to the land appears of record prior to the recording of the conveyance to Rutledge and his privies.

G. S. 1894, § 4180, and the case of *Berryhill v. Smith*, 59 Minn. 285, 61 N. W. 144, control this case. In that case it was said, at page 288:

"There is no warrant in the language of the statute for limiting it to judgments in favor of creditors where a lien is acquired by docketing. Its language is very broad: 'Any judgment lawfully obtained at the suit of any party against the person in whose name the title to such land appears of record.' It seems to us that this applies to any judgment determining or affecting the title of the person in whose name such title appears of record, and that any such judgment will equally affect the title of a grantee from that person under an unrecorded conveyance. * * * It is well known that judgments or decrees are often essential links in the chain of record title, the decree frequently having the effect of a conventional conveyance. In dealing with real estate these decrees or judgments are necessarily relied on to the same extent as recorded conveyances. But if, notwithstanding a valid judgment against the party in whose name the title appears of record affecting that title, such judgment does not also affect the title of a grantee of that party under an unrecorded conveyance, then no one could ever safely deal with any property where such a judgment was one of the links in the chain of title. Such cases are clearly within the mischiefs intended to be prevented by recording acts, and we have no doubt they are within both the spirit and language of our statute."

Upon the record, therefore, we hold that the appellants were entitled to a finding by the trial court upon the questions or points which we have quoted and which are assigned as errors, and it was error for the trial court to refuse to make such finding. If there are other errors, as assigned by the appellants, they will doubtless be avoided upon a new trial, as we refuse to direct a judgment for the plaintiffs.

The order denying the motion for a new trial is reversed, and a new trial granted.

THORA CAROLINE JACOBSON v. A. G. ANDERSON and Another.

June 2, 1898.

Nos. 11,164—(233).

Guardian—Delivery of Ward's Estate to Probate Judge—Release of Sureties.

At the expiration of a guardian's trust, the estate, moneys and effects remaining in his hands upon the settlement of his accounts with the probate court cannot be by him paid and delivered over to such court, so as to exonerate him or the sureties on his bond from their being paid and delivered to the person lawfully entitled thereto. The probate judge is not such person.

Settlement of Account—Order of Court Conclusive upon Guardian's Sureties.

If a surety stipulates for any particular method by which the liability of his principal or himself shall be fixed, he is bound by it. *Held*, that the sureties on the guardian's bond in this action were concluded by the order of the probate court entered against him, finding the amount of money in his hands upon his settlement of his accounts as such guardian, and that it was due from him to the persons lawfully entitled thereto.

Appeal by plaintiff from an order of the district court for Polk county, Ives, J., denying a motion for a new trial, after a verdict in favor of defendants, directed by the court. *Reversed*.

A. R. Holston, for appellant.

Ole J. Vaule, for respondents.

BUCK, J.

This action was brought in the district court of Polk county to recover a certain sum which the probate court of that county had found to be due from plaintiff's former guardian, C. Saugstad. The action is brought by plaintiff's present guardian against Saugstad's bondsmen, upon the ground that he did not account for and pay over moneys which he had in his hands as such guardian. The probate court authorized the bringing of this action by the present guardian. It appears that on April 16, 1890, the probate court of Polk county appointed C. Saugstad guardian of the person and estate of Thora C. Jacobson, a minor. Thereafter, on November 10, 1893, Saugstad, as such guardian, gave a bond in due form in

the sum of \$1,000, with the defendants Anderson and Olson as sureties, the conditions and obligations of which were as follows:

"The condition of this obligation is such that if the above-bounden Christian Saugstad, in the capacity of guardian, shall and will faithfully, in all things, execute the duties of his trust, as guardian of the persons and the estates of Elesif P. and Thora C. Jacobson, minors, according to law; and shall make a true inventory of all the estate, real and personal, of his said wards that shall come to his possession or knowledge, and shall return the same into the probate court of the proper county within three months; and shall dispose of and manage all such estate according to law, and for the best interest of the said wards; and shall faithfully discharge his trust in relation thereto, and also in relation to the custody, education, and maintenance of his said wards; and shall render an account on oath of the property, estate, and moneys of the said wards in his hands, and all proceeds or interest derived therefrom, and of the management and disposition of the same, within one year after his appointment as such guardian, and at such other times as the probate court shall direct; and shall, at the expiration of his trust, settle his account with the probate court, and pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person or persons who shall be lawfully entitled thereto,—then this obligation shall be void; otherwise, to remain in full force and virtue.

Signed, sealed, and delivered
in presence of
C. M. Benson.

C. Saugstad. [Seal.]
A. G. Anderson. [Seal.]
N. K. Olson. [Seal.]"

It also appears to be conceded that Saugstad permanently removed from the county of Polk and state of Minnesota in the spring of 1895, and settled at Bella Coula, in British Columbia. The record shows that the present guardian, who brought this action for her ward Thora Caroline Jacobson, was appointed such guardian on November 4, 1895, by the probate court of said county of Polk, but that Saugstad was not formally discharged as such guardian until February 19, 1896, at which time he settled his account, and admitted a balance due his ward of \$265.51.

Subsequently, the present guardian, Mathilda Wilson, assuming that such settlement was illegal, and that no notice of the time and place of the examination of said account was fixed by the probate court, and no notice thereof given to the ward and persons interested (although the order discharging him recites that due notice

was given and served), petitioned that a citation be issued out of said probate court to Saugstad to show cause why his pretended final account should not be set aside as illegal and void, and that he be required to turn over to the present guardian all the moneys of said minor. A citation was accordingly issued requiring him to appear before the probate court on April 26, 1897, and show cause, if he had any, why he should not make his final account as such guardian, and pay and deliver over to his successor, Mathilda Wilson, as guardian of said ward, all moneys belonging to said ward. At the time and place so designated Saugstad appeared and the hearing was continued until June 7, 1897, when all parties appeared and a trial of the matters was had upon the merits. It does not appear from the record that Saugstad made any objection to the regularity of the appointment of Mathilda Wilson as guardian, or to her acting in the proceeding in such capacity, and the probate court recited in said order that she was the present guardian, and made the further order as follows:

"The court, upon hearing said parties and upon examining the records and files herein, and being fully advised in the premises, finds that said Saugstad still has in hand, as such guardian, including interest thereon, the sum of \$289.77, the property of said minor, his said ward, which sum said Saugstad has wholly failed to account for or pay over, and which said Saugstad still retains, as appears by his account filed herein; wherefore the court finds, and it is hereby ordered, that said Saugstad pay over to said Mathilda Wilson, for the use of her said ward, the sum of \$289.77, the same being the amount now in his hands belonging to said minor.

Dated June 7th, 1897.

By the Court:

Ole E. Hagen,
Judge of Probate.

Duly filed and recorded June 7, 1897."

This order was never appealed from nor reversed, and we are of the opinion that it stands conclusive between the parties. See *Mumford v. Hall*, 25 Minn. 347. It did, however, appear upon the trial of this action, by uncontradicted evidence, that Saugstad had, on February 20, 1896, paid to C. M. Benson, then judge of probate of Polk county, the sum of \$265.51, on account of the estate of

Thora C. Jacobson, being the sum which he had accounted for as being in his hands as her guardian.

Why Benson did not pay over this money to the proper party, or what has become of it, does not appear. If this payment relieved Saugstad of any charge of intentional dishonesty, as it certainly should, it did not release him or his bondsmen from a personal liability. Nowhere do we find in the statute any authority permitting the guardian to make such payment to the probate court. G. S. 1894, § 4544, subd. 4, requires the guardian,

“At the expiration of his trust to settle his accounts with the probate court, and to pay and deliver all the estate, moneys and effects remaining in his hands or due from him on such settlement, to the person lawfully entitled thereto.”

Who is the person lawfully entitled thereto? Not the probate judge, for it does not belong to him. He is neither the owner nor trustee, nor entitled to its custody. The judge is by law made the judicial arbiter as between the guardian and the parties entitled to the estate. When he has performed this duty, his authority over the subject-matter ends, unless it be to enforce his decisions upon the settlement and accounting which he has heard. Suppose in this very case the amount had been \$10,000, or a greater sum, and it was paid over to an insolvent or dishonest probate judge, and it disappeared the way this amount has evidently gone; what remedy would the owners of the property have upon a probate bond of \$1,000, for that is the sole amount which a probate judge is required by statute to give before entering upon the discharge of the duties of his office? ✓

The statute clearly contemplates that when a guardian has settled his accounts with the probate court, and his guardianship has terminated, whatever estate, money, and effects remain in his hands or are due from him on such settlement shall be turned over to the guardian who succeeds him, or, if the guardianship is fully ended, to the ward or to the person who is lawfully entitled thereto as owner, trustee, or in such other capacity as may lawfully appear, but not to the probate court as such officer. We think that it would be against public policy to permit the probate judge to be burdened with the annoyance, inconvenience, and responsibility

which would inevitably result in making him the custodian, and responsible for the safe-keeping, of such property, either during a period of litigation or in the contingency that the parties lawfully entitled thereto could not be readily found. Such payment, therefore, to the wrong party, even though made bona fide, does not release Saugstad, and the determination of the probate court as to the amount due from Saugstad as guardian was conclusive as to him, as he voluntarily litigated that question, without any objections of any kind as to parties or the subject-matter. It was also binding and conclusive upon Saugstad's sureties, because he violated the conditions which, by the terms of the bond, they had contracted he should perform. The rule of this court in this respect is stated by Justice Mitchell in the case of Pioneer S. & L. Co. v. Bartsch, 51 Minn. 474, 477, 53 N. W. 764, as follows:

"Of course every one is familiar with the rule that, as against any one except the parties and their privies, a judgment is evidence only of the fact of its recovery. What are sometimes called exceptions to this rule are not exceptions, but do not fall within the rule at all, depending solely upon the principle that one may contract to be answerable to another upon such lawful conditions as he pleases. Hence, if a surety stipulates for any particular method by which the liability of his principal or of himself shall be fixed, he is bound by it. If he has undertaken, either expressly or by implication from the position which he has assumed with reference to pending litigation, to be responsible for the result of a suit between others, to which he is not a party and to which he has not been made privy by notice and an opportunity to defend, then, in the absence of fraud and collusion, the judgment against the principal alone would be conclusive evidence against him of every fact which it was necessary to find to recover such a judgment. This would be because he had so contracted."

Brandt, Sur. §§ 110, 580.

Order reversed.

MINNESOTA TITLE INSURANCE & TRUST COMPANY v. WILLIAM
REGAN and Others.

June 2, 1898.

Nos. 11,169—(145).

**Corporation—Manufacture and Lease of Machinery—Const. art. 10,
§ 3.**

A domestic corporation was organized, and the general nature of its business was to manufacture, sell, use, and lease machinery and manufactured articles. *Held*, that it was not organized for the purpose of carrying on a manufacturing business exclusively, and that its stockholders are not within the exception found in Const. art. 10, § 3.

Action in the district court for Hennepin county by plaintiff, as judgment creditor of Fisher Specialty Manufacturing Company, a corporation, in behalf of itself and other creditors, against the corporation and its stockholders to recover upon their statutory liability. From an order, Johnson, J., overruling their demurrer to the complaint, certain stockholders appealed. *Affirmed*.

Geo. M. Bleecker, for appellants.

Van Fossen & Frost, for respondent.

BUCK, J.

This case comes before this court upon demurrer to the complaint, and the question presented is whether the defendant Fisher Specialty Manufacturing Company is, under the constitution (article 10, § 3), a corporation organized exclusively for the purpose of carrying on any kind of manufacturing business. The particular clause of the articles of incorporation of the company reads as follows:

"The general nature of the business of said corporation shall be to manufacture, sell, use and lease machinery and manufactured articles, and, incidental thereto, to buy, own, sell, lease, or otherwise dispose of real estate, patents, inventions and other personal property."

It is unnecessary to discuss or pass upon that part of the article relating to what is claimed to be incidental to the main business. The other part of the article does not limit the corporation to the

selling, using, and leasing of machinery of its own manufacture. It may not only engage in the business of manufacturing machinery, but it is also expressly authorized to sell, use, and lease machinery manufactured by third parties. While both kinds of business,—that is, the manufacture and selling of goods manufactured by itself, and selling those manufactured by third persons,—might be lawfully done by the corporation, yet the liabilities of the stockholders would in such case be different from those of a corporation manufacturing and selling its own goods.

If stockholders desire to invoke the protection of that clause of the constitution referred to, they must insert in their articles of incorporation terms limiting business to that of manufacturing, or such as is properly incidental thereto, and do this in express terms. Here the language used is not so limited, and not even equivocal or of doubtful import, but in express terms permits the business of selling, using and leasing machinery and manufactured articles in unlimited quantities not of its own manufacture. Thus, it could do a general mercantile business under the guise of being merely a manufacturing concern. *St. Paul Barrel Co. v. Minneapolis Distilling Co.*, 62 Minn. 448, 64 N. W. 1143; *Commercial Bank v. Azotone Mnfg. Co.*, 66 Minn. 413, 69 N. W. 217. The stockholders are therefore not within the exception found in the constitution (article 10, § 3).

Order affirmed.

S. E. OLSON COMPANY v. CHARLES YOUNGQUIST.

June 2, 1808.

Nos. 11,181—(192).

Goods Sold to Wife—Liability of Husband—Evidence.

Held, that the evidence in this case was not such as to justify a finding that the wife had authority from the husband to purchase the goods sued for on his credit.

Action begun in justice court to recover \$52.32 for necessities furnished defendant's wife and minor children. Plaintiff recovered

72	432
176	28

in that court a judgment for \$23.39, and an appeal was taken to the district court for Hennepin county, where the case was tried without a jury before Simpson, J., who found in favor of plaintiff for the amount claimed. From an order denying a motion for a new trial defendant appealed. Reversed.

Merrick & Merrick, for appellant.

P. M. Babcock, for respondent.

BUCK, J.

The plaintiff brought this action against the defendant, Youngquist, to recover the sum of \$52.32, claimed as the reasonable value of certain goods, which it is alleged were necessities sold by plaintiff to defendant's wife for her use and that of their minor children. These goods consisted of certain wearing apparel, but we do not deem it necessary to pass upon the question as to whether they were necessities or not, as the order denying the defendant's motion for a new trial must be reversed upon another ground.

There is no claim made and no evidence showing that the husband expressly authorized the purchase of these goods. Nor is there any evidence showing that the defendant's wife ever before this time purchased any goods of plaintiff upon her husband's credit. They were living apart, though he was furnishing her for the support of herself and children a considerable portion of his income, and there is no evidence showing that he ever refused or neglected to support his family in a suitable manner. It is the legal duty of a husband to support his wife and minor children, and do this according to his circumstances and condition in life. There is no presumption that defendant disregarded or disobeyed his legal obligation in this respect, and the burden of proving to the contrary rested on plaintiff, which it failed to do. Of course, the conduct of the wife might be such in some exceptional cases as to destroy this legal duty altogether, but that question is not here involved. There was no evidence to justify a finding that the husband had conferred upon the wife express or implied authority to purchase these goods on his credit, or that he had refused or neglected to provide suitable support for her, so as to authorize her to do so by virtue of the marriage relation. The liability of a husband for

goods sold on credit to a wife is quite fully discussed and passed upon in the case of *Bergh v. Warner*, 47 Minn. 250, 50 N. W. 77, and we do not deem it necessary to discuss the question further.

Order reversed.

STATE OF MINNESOTA ex rel. FRANK M. SMITH, Administrator, v.
PROBATE COURT OF MOWER COUNTY.

June 3, 1898.

Nos. 11,033—(136).

Certiorari—Order of Probate Court—Extending Time to File Claim.

Certiorari will not lie to review an order of the probate court whereby, after a claim against the estate of a deceased person had been filed for allowance, and after the time fixed for presentation of claims had expired, it permitted such claim to be amended upon the petition of third parties having an interest in the same.

Same—Remedy by Appeal.

The remedy is ample by an appeal from the order allowing the claim, if there be such an order made.

Appeal by relator, administrator of the estate of Daniel B. Smith, deceased, from an order of the district court for Mower county, Whytock, J., quashing a writ of certiorari issued out of that court to the probate court of that county, and affirming an order of the probate court allowing the amendment of a claim. Affirmed.

Alva R. Hunt, for appellant.

S. D. Catherwood, for respondent.

COLLINS, J.

Appeal from an order of the district court of Mower county quashing a writ of certiorari issued and directed to the probate court of the same county. From a somewhat defective paper book we find that, within the time fixed by said probate court, a certain corporation filed for allowance a somewhat informally prepared claim against the estate of one Smith, deceased, who had in his lifetime been one of its six stockholders, to which the relator administrator filed objections. After the time for filing claims expired,

but before that in question had been passed upon, the surviving stockholders, five in number, alleging an interest in the claim, petitioned the court to extend the time so that they might amend the same, as filed, so that it should be properly itemized and verified. The petition was granted, and a day fixed for an examination and hearing. Thereupon the writ of certiorari was issued, as before stated.

The order appealed from must be affirmed. Certiorari, as has been stated hundreds of times, is an extraordinary remedy, and cannot be resorted to except where there is no other mode of relief,—no other adequate remedy,—and then only after a final judgment or a final order affecting a substantial right. The order determines nothing in respect to the merits of the claim. The estate has not been affected or injured by it, and when the merits are reached and passed upon the present appellant may have no cause for complaint; the estate may not be aggrieved or prejudiced. If, upon the other hand, the claim, as filed under the order, should be allowed, the remedy is ample, and is by appeal; for, should either party appeal, the right of the court to grant the petition and make the order complained of would of necessity be directly involved. The remedy, if a remedy becomes necessary, is by appeal, and certiorari will not lie.

Order affirmed.

MORRIS WOLF v. GREAT NORTHERN RAILWAY COMPANY.

June 3, 1898.

Nos. 11,080—(140).

Injury to Employee—Assumption of Risk—Tearing Down Wall—“Gravel-Pit Cases” Distinguished.

Where a servant engaged in tearing down a wall of stone and mortar by the undermining process (that is, by first removing the stone from the bottom of the wall) is injured, the doctrine of the assumption of risks, laid down in what are known as the “Gravel-Pit cases,” does not apply. It cannot be held, as a matter of law, that such a servant assumes the risks and dangers incident to the employment.

72	435
73	86
73	87

Abatement—Other Action Pending—Second Action Unauthorized.

Recovery in an action will not be defeated by the fact that another suit to recover on the same cause of action has been instituted, with the same plaintiff and the same defendant, when it is alleged in the reply, established by the evidence, and specially found by the jury that the suit last mentioned was commenced without plaintiff's authority. He is not obliged to dismiss the unauthorized action, as a preliminary to his right to recover in the one actually authorized and prosecuted by him.

Appeal by defendant from a judgment of the district court for Hennepin county, in favor of plaintiff for \$1,515.16, after a trial before Jamison, J., and a jury. Affirmed.

W. E. Dodge, for appellant.

F. D. Larrabee, for respondent.

COLLINS, J.

While plaintiff was at work for defendant as a common laborer, engaged with others in tearing down and removing a stone wall from underneath a building, he received injuries, and instituted this action to recover damages therefor. The jury found in his favor, and defendant appeals from a judgment entered upon the verdict.

One of the principal points made by counsel for defendant is that the evidence was insufficient to support the verdict; and, properly to discuss this question, the facts on which the finding in plaintiff's favor was based must be quite fully stated.

Plaintiff was inexperienced at this particular kind of work, and during the first day was kept at shoveling. The wall or underpinning was about 60 feet long, at least 5 feet high, and 18 inches thick, built of common limestone laid in mortar. A few feet at one end had been torn down, and after excavating the earth on one side of the wall for a few feet laterally, so as to get at the foundation stones, plaintiff and another man were directed by the foreman to tear down a section of about four feet of the wall itself, commencing at the bottom layers of stone, and removing upward,—a common way of doing this kind of work, where the wall is not so high as to make the method very hazardous by reason of the danger attendant upon the falling of a large quantity of material from overhead. The plaintiff held a chisel against the mortar seams,

and the other man struck the head of this instrument with a hammer, thus loosening the layers of stone; and, with a little prying, the stones fell to the ground of their own weight. After one layer, at least, of stone had been removed in this manner, and while the men were endeavoring to take out another, that part of the wall immediately above the space created by the removal suddenly collapsed and fell to the ground, causing the injuries complained of. The estimated weight of the part which then fell was seven or eight hundred pounds. The testimony tended to show that, just prior to commencing the work of removing stone, plaintiff used his pick for the purpose of ascertaining the stability of the wall at that point, and was told by the foreman to go ahead,—that the frost (it was in early spring) would hold it, and that the wall was safe.

1. Upon this state of facts, defendant's counsel contends that when injured plaintiff was engaged in work not extrahazardous nor attended with unusual dangers, but was in such a common and ordinary occupation as every laborer engages in daily, and always subject to the rule of the assumption of the risks attending such employment, and further, that under the evidence plaintiff has been brought directly within the rules of law laid down in what are known as the "Gravel-Pit cases,"—notably, *Pederson v. City of Rushford*, 41 Minn. 289, 42 N. W. 1063. We cannot agree with counsel.

In the case just mentioned it was said that a master is not bound to provide safe employment for his servant, nor to do his work in a safe way, provided the servant, when he enters on the work, knows the risks and dangers incident to that kind of work and to that way of doing it; that no skill or science is required to inform one that the upper part of a bank of earth will come down when the lower part upon which it rests is removed; and that, when the servant knows the dangers, he takes upon himself the risks by accepting the employment, and when the dangers are not concealed, but are open to the senses, he is ordinarily bound to know them. Applying these rules, it was necessarily held that as the ordinarily intelligent man must know the effect and operation of the laws of gravitation,

and of undermining a bank of earth, he assumes all of the risks when so at work, and cannot recover where the earth falls upon him of its own weight. But it was not expected that these rules would be pertinent in all cases where the casualty is caused by the operation of the laws of gravitation.

It is obvious that the man of ordinary intelligence would know that, if a sufficient quantity of the lower part of a wall composed of stone and mortar was removed, the portion above would fall of its own weight, its support being taken away. But a wall of stone and mortar has lateral strength not found in a bank of earth, for its constituent parts are joined and connected laterally as well as in other directions. Remove a part of the foundation of a wall, and the balance above may be sustained in place, in some degree, through its adherence to the stone and mortar upon the sides; but not so with earth. This appeared from the evidence in this case, for several of the expert witnesses stated that usually the wall above hung after removing the lower stones, and had to be broken off by means of wedges inserted at the top. So that while every ordinarily intelligent man must be held to know that earth will fall, if undermined, he might not readily understand how far he could go with comparative safety when removing foundation stones or the lower layers of a stone wall of the height of the one now under consideration.

This case, on the facts, is not one where we can say that no skill or science were required in order to understand the risks incident to the employment, nor that the exposure to the dangers was open to the senses of the ordinary man. Nor can it be held, as a matter of law, that a servant engaged in this kind of work assumes the risk incident to the employment. On the facts this case is easily distinguishable from the Gravel-Pit cases, and the principles which control such facts have been repeatedly stated. See *Bennett v. Syndicate Ins. Co.*, 39 Minn. 254, 39 N. W. 488, and cases cited.

2. The answer herein alleged that, prior to the commencement of this action, plaintiff had instituted another action in Ramsey county, to recover for the identical injuries, in which the issues were the same, which action, it was alleged in abatement, was still pending. The reply admitted that such an action had been brought

and was still pending, but averred that all of the proceedings therein were taken without plaintiff's authority and against his will. At the trial a written instrument executed by plaintiff, and delivered to the attorney at law who brought the first action, was produced in evidence, whereupon plaintiff introduced testimony tending to show that this writing was obtained by fraud practiced upon him. The jury found specially that the pending action set up in the answer was commenced without plaintiff's authority. And it is not urged that this special verdict was not supported by the evidence.

The claim made by defendant's counsel on this feature of the case is that, under the decisions (*Page v. Mitchell*, 37 Minn. 368, 34 N. W. 896, and *Nichols v. State Bank*, 45 Minn. 102, 47 N. W. 462), it was required of plaintiff that he cause the first suit to be dismissed, and set up such dismissal in his reply, or that it was essential, at least, that the first be actually dismissed when the one at bar was tried, and that the admitted pendency of the first at the time the second was tried absolutely prohibited a recovery in the second. The rule, as settled in this jurisdiction, is correctly stated by counsel, but it has no application to a case where the action pleaded in abatement has been instituted without authority.

The special verdict amounted to a finding that no action had been commenced by plaintiff, and as a consequence that none was pending. It was not plaintiff's action, but one brought in his name, and without his authority, and over which he was not bound to assume control. He had a right to repudiate it by declining to take any part in either its prosecution or its dismissal. He was not bound by the unauthorized commencement of an action in his behalf against defendant, and, if thereafter bound, it would be because he had adopted the act, and the fact created an estoppel. The parties were the same in both actions, and the issue made in respect to the lack of authority to bring the first could be more easily and fairly litigated on the actual trial of the second than it could be on a motion to dismiss, necessarily on affidavits, made in the first.

3. The written instrument or contract hereinbefore mentioned,

and referred to in the sixth assignment of error, is not before us, and therefore the assignment is passed without consideration.

4. Other assignments need no special mention.

Judgment affirmed.

CANTY, J.

I concur in the first part of the foregoing opinion, on the principles laid down in my concurring and dissenting opinions in the series of cases commencing with *Blomquist v. Chicago, M. & St. P. Ry. Co.*, 60 Minn. 426, 62 N. W. 818. In the latter case, at page 433, I laid down the following proposition:

"When the inferior servant knows and appreciates the dangers to be avoided, and is as well, or nearly as well, able to care for himself as the foreman is to care for him, he is substantially on an equal footing with the foreman, and in a better position than the master to look out for his own safety. In such a case the foreman is not a vice principal, but he and the inferior servant are fellow servants. On the other hand, when the servant does not know or does not appreciate the danger to be avoided, and from his grade or position cannot be expected to know or appreciate such danger, while a competent foreman should be required so to do, it is not good public policy to hold that the master is not liable for the negligence of the foreman, resulting in injury to the servant."

This applies here. Whether such conditions existed as would constitute the foreman a vice principal was, on the evidence in this case, a question for the jury. While this wall may have been taken down in the usual way of taking down such walls, still it is not a kind of work that is common or frequent, common laborers would not ordinarily be familiar with its dangers, and it required some considerable degree of skill to determine whether the work here in question was being done in a reasonably safe manner. The Gravel-Pit cases are not parallel. It requires less skill to determine whether it is safe to work under a bank of earth or gravel, and, besides, common laborers usually do very much more of the latter kind of work, are ordinarily much more familiar with its dangers, and better able to take care of themselves when employed in such work. They are usually about as well able to look out for their own safety, when employed in such work, as the foreman is to look out for them. I concur, also, in the last part of the opinion.

OLE LARSON v. JOHN K. JOHNSON.

June 3, 1898.

Nos. 11,146—(223).

Special Administrator—Action to Set Aside Conveyance.

A special administrator, appointed under the provisions of G. S. 1894, § 4483, cannot maintain an action, as such administrator, to set aside and cancel, together with the record thereof, a deed of conveyance of real estate, made, executed, and delivered to a third party by a decedent in his lifetime.

Same—Right to Sue—G. S. 1894, § 4484.

The powers and duties of such an administrator, in respect to maintaining actions, are fixed in express terms in G. S. 1894, § 4484.

Action by one of the special administrators of the estate of Knute Johnson in the district court for Polk county for cancellation of certain deeds. The case was tried before Ives, J., and a jury. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

Ole J. Vaule, for appellant.

A. R. Holston, for respondent.

COLLINS, J.

Under the provisions of G. S. 1894, § 4483, plaintiff and defendant were appointed special administrators of the estate of one Johnson, deceased, father of defendant, pending an appeal from an order of the probate court refusing to allow and admit to probate an alleged last will and testament of the deceased. Thereupon plaintiff, in his capacity of special administrator, and solely as such, brought this action to set aside and cancel two deeds of conveyance, together with the record thereof, which deeds were made, executed, and delivered by the deceased in his lifetime, his wife joining, and by and in which they granted, bargained, sold and conveyed certain tracts of land to the defendant, their son. The grounds alleged for setting aside and canceling these deeds, and the record thereof, were that Johnson was induced to execute the same by means of fraud and misrepresentation on the part of his son, the grantee,

and, further, that he was actually insane at the time. Certain questions of fact were submitted to a jury at the trial, and on the answers thereto and findings, with conclusions of law, made by the court, judgment was ordered, canceling the deeds and the record of the same, as demanded in the complaint.

The appeal is from an order denying defendant's motion for a new trial, and the first and only question which we are required to answer is that raised by the contention that a special administrator has no authority or right as such to bring an action of this nature, and consequently is not entitled to the relief or judgment ordered by the court below.

The question is determined by an examination of G. S. 1894, § 4484, wherein the powers and duties of a special administrator are prescribed, which section must be strictly construed. He is given power to collect the goods, chattels, and credits of the deceased. He is also authorized to care for, gather and secure crops, and it is his duty to preserve all of the property of the deceased for the after-appointed executor or administrator; and, for any or all of these purposes, he is authorized to commence and maintain actions in his administrative capacity. A bare reading of this section, all thereof pertinent here being stated above, precludes any argument in support of the claim that a special administrator has the power to prosecute an action of this character. He is directly authorized to maintain actions for the purpose of collecting goods, chattels, and credits, or which will aid him in caring for, gathering, or securing crops, or in preserving property,—that is, in taking care of and protecting such as is under his control; but here his power ends.

That it was intended that he should not have all of the authority conferred upon an executor or general administrator is evident from subsequent sections of the same chapter, in which other and more important powers and duties are expressly conferred and imposed upon the latter; such, for illustration, as section 4497, whereby an executor or administrator is authorized, by himself or jointly with the heirs or devisees, to maintain an action for the possession of real estate, or for the purpose of quieting title thereto. We have heretofore construed section 4484, in *Richmond v. Campbell*, 71

Minn. 453, 73 N. W. 1099,—a construction in line with what is now held, although the case on the facts is not in point.

Order reversed, and on remittitur the court below will cause judgment to be entered in defendant's favor.

CHARLES BELTZ v. SIMON MATHIOWITZ.

June 3, 1898.

Nos. 11,160—(60).

72	443
78	518
72	443
82	146

Government Survey—Quarter-Section Post.

The rule is well settled that the corner of a government subdivision of land is where the United States surveyors establish it, whether the location is right or wrong.

Same—Lost Section Post—Location May Be Proved.

If a government quarter-section or section post has disappeared, the site of its location may be established by clear and satisfactory evidence, and, if so established, will control and govern as fully as if the original post remained.

Same—G. S. 1894, § 836—When Applicable.

G. S. 1894, § 836, is construed in harmony with this rule. It applies only to cases where the original posts have been destroyed, and the sites of their original location cannot be ascertained by evidence of the character before mentioned.

Appeal by defendant from a judgment of the district court for Brown county, in favor of plaintiff entered in pursuance of the findings and order of Webber, J. Affirmed.

John Lind, for appellant.

Somerville & Olsen, for respondent.

COLLINS, J.

This litigation grows out of the dispute over the exact location of the east and west line between the N. E. $\frac{1}{4}$ of section 13, township 111, range 33, owned by plaintiff, and the S. E. $\frac{1}{4}$ of the same section, owned by defendant. The east line of this section is the east line of the township, and a highway laid out thereon has been graded and traveled for many years. The real cause of the dispute is the

disappearance or destruction of the quarter corner post established and set many years ago by the government surveyors on the line between said section 13 and the section exactly east thereof, the place of location being now a part of the graded and traveled highway.

It is the claim of counsel for plaintiff that, notwithstanding the disappearance of the original post, its exact location was clearly and satisfactorily shown upon the trial. The court so found when it fixed the line between the two quarter sections, and in effect located the quarter corner 119 chains and 66 links north of the southeast corner of section 24 in the same town and range. Defendant's counsel insist that the finding was not warranted by the evidence, and further, even if it was, that under the provision of G. S. 1894, § 836, the government field notes are the primary evidence for finding or locating a corner in all cases where it appears that the post originally located by the government surveyors has been destroyed, and that these notes must control in every such instance. And it seems to stand confessed by all that, if the field notes are to govern, the disputed corner must be fixed about 34 links north of the point designated by the court below. So that upon the trial the plaintiff's counsel devoted their energies to an attempt to establish the actual site of the original post as the same was placed in position by the government surveyors; while counsel for defendant contended as a matter of law under the statute that its original site was to be ascertained and fixed by actual measurements made from undisputed government corners in accordance with the field notes, and that these notes absolutely control in all cases where the original posts have been destroyed.

It is the general rule here, as well as elsewhere, that courses, distances and descriptions must yield to actually existing monuments, or to the site of their former location, if clearly established. *Chan v. Brandt*, 45 Minn. 93, 47 N. W. 461. See, also, *Yanish v. Tarbox*, 49 Minn. 268, 51 N. W. 1051. And it is the established rule that the true corner of a government subdivision is where the United States surveyor established it, whether this location is right or wrong. *Beardsley v. Crane*, 52 Minn. 537, 54 N. W. 740. In view of what was said in the case first cited in respect to the site of

lost monuments (although section 836, *supra*, was not then under consideration), it would seem to be settled in this jurisdiction that if, for any cause, the original government post or monument has disappeared, its location can be ascertained by competent evidence, and thus established; and, if clearly and satisfactorily so established, the site of such location will govern and control as fully as if the original remained in position.

Section 836, which provides for the fixing of quarter-section and section posts where the originals have been destroyed, such fixing to be in accordance with the field notes, was not intended to apply to cases where the sites of the original locations could be clearly and satisfactorily established, but simply to cases where the original location could not be so ascertained. The section is not to be construed in opposition to the settled rule, but on the contrary in harmony with it. To adopt the construction placed by counsel on the section would be to hold that the moment a government post disappeared its location could only be ascertained in accordance with the field notes, no matter how well settled or known the original location had become. If the field notes failed to correspond with the actual location, such a rule would countenance that which could not be done,—the appropriation of one man's land by another on the destruction or disappearance of a government monument or post which had theretofore been on the boundary line.

On the only question of fact in this case, we are of opinion that the original site of the quarter post was clearly and satisfactorily established by plaintiff's proof.

Judgment affirmed.

JAMES F. O'NEILL and Another v. WILLIAM E. JONES and Another.

June 3, 1898.

Nos. 11,189—(51).

Forcible Entry and Detainer—G. S. 1894, §§ 6108, 6109—Purpose of Action.

The purpose of G. S. 1894, §§ 6108, 6109, is to give a speedy remedy to those whose possession of real property has been invaded, and not to take the place of the action of ejectment.

Same—Actual Occupation.

Forcible entry and detainer is essentially an action given to protect actual occupation of real estate against unlawful intrusion or forcible detention; and, to maintain such an action, a plaintiff must prove that he or his grantor was in the actual and peaceful possession of the premises in dispute.

Same—Constructive Possession.

Mere constructive possession is insufficient, although an actual foothold is not always absolutely required.

Same—Evidence of Constructive Possession Insufficient.

Held that, from the evidence in this cause, the possession relied upon by plaintiffs was at most merely constructive, and insufficient for the purpose of maintaining an action of forcible entry and detainer against appellant.

Appeal by defendant Jones from a judgment of the municipal court of Duluth, in favor of plaintiffs, directing restitution of the premises to them, entered in pursuance of the findings and order of Edson, J. Reversed.

Fryberger & Johanson, for appellant.

S. D. Allen, for respondents.

COLLINS, J.

The purpose of the forcible entry and detainer act (G. S. 1894, c. 84, §§ 6108, 6109) is to give a speedy remedy to those whose possession has been invaded, and not to take the place of the action of ejectment. Except in the cases of landlords and of mortgagees, elsewhere provided for in the same chapter, this remedy has not been extended to try the title or right of possession in favor of

one who has never been in possession of the lands in controversy. Forcible entry and detainer is essentially an action given to protect actual occupation of real estate against unlawful invasion or forcible detention. To maintain this action a plaintiff must prove that, at the time of the entry and detainer of which he complains, he or his grantor was in the actual and peaceful possession of the premises in dispute. Mere constructive possession is insufficient, although an actual foothold is not always absolutely requisite; and the question involved is always the fact of possession, not the right of possession. An examination of many cases cited upon these propositions in 8 Am. & Eng. Enc. 117-119, will show how elementary they are. Nothing more is required in this case than an application of these rules to the facts admitted or conclusively established at the trial.

In plaintiffs' complaint, they allege that a certain corporation had been the owner and in possession of the real estate for a long time prior to June 1, 1897; that on said day it leased the same to plaintiffs for one year, with the right of possession; and that on said June 1 defendants wrongfully and forcibly entered thereon, and thereafter unlawfully and by force detained possession from plaintiffs. The answer alleged that defendant Jones was lawfully in possession, and denied that the corporation ever owned the land, or ever had possession of the same.

At the trial plaintiffs introduced in evidence, under objections made by defendants' counsel, a deed of bargain and sale, of date April 19, 1888, by and in which one Diether granted and conveyed the premises in controversy to the before-mentioned corporation, and also a lease of the same to the plaintiffs for the term of one year from June 1, 1897. It was also shown by oral evidence, and under objection, that the corporation caused these lands to be surveyed and subdivided into town lots in the year 1889; that thereafter it caused squatters and other persons to be put off; that no part of the land was ever inclosed, and no one acting for or under said corporation had ever resided thereupon. To vindicate his possession, defendant Jones introduced in evidence a quitclaim deed of the premises executed and delivered to him by his co-defendant on July 6, 1897. He also testified as to his good faith when

receiving the deed, and paying a valuable consideration therefor.

From this evidence it conclusively appeared that the corporation, as well as defendant Jones, had color of title to the premises, that the latter had entered upon the same peacefully, and that when so entering the corporation was not in actual possession, and never had been. Its acts when surveying and subdividing the land into lots and blocks, seven years prior to defendant's entry, and when driving off squatters and other persons at some later period not designated, gave it at best nothing more than constructive possession. None of the cases cited by plaintiffs' counsel sustain his contention that these facts constituted possession sufficient to maintain this action.

Judgment reversed, and new trial granted to appellant.

JULIA FULMORE v. ST. PAUL CITY RAILWAY COMPANY.

June 6, 1898.

Nos. 10,960—(74).

Street Railway—Injury to Passenger—Verdict Sustained by Evidence—Damages.

Evidence considered, and *held* that it supports the verdict, and that the damages awarded are not so excessive as to justify the conclusion that they were given under the influence of passion or prejudice.

Same—Medical Expert—Opinion Based on Examination.

A medical expert gave an opinion in this case, and, on his cross-examination, testified that his opinion was based entirely upon his examination of the plaintiff, and what was elicited during the examination from her. *Held*, on the evidence, that the trial court did not err in refusing to strike out his opinion.

Appeal by defendant from orders of the district court for Ramsey county, O. B. Lewis, J., denying its motion for judgment notwithstanding the verdict or for a new trial. *Affirmed*.

Munn & Thygeson, for appellant.

The court erred in declining to strike out the testimony that the motorman started his car when he was given a signal to stop. The

only purpose and object of such testimony was to show an incompetent and unfit servant. It was clearly prejudicial as tending to enhance the damages. Testimony of the unfitness of a servant is introduced sometimes for the purpose of recovering even punitive damages. It must then be shown that the master had knowledge of such incompetency. *Hutchinson, Car.* § 536. In this case there was no evidence of notice to or knowledge by defendant of the motorman's unfitness, and this testimony was, therefore, not competent on that subject. It was admitted for that purpose in the case of *Cleghorn v. New York Central*, 56 N. Y. 44. Evidence of incompetency naturally tends to enhance damages. *Fay v. Davidson*, 13 Minn. 491 (523); *Baltimore & O. R. Co. v. Colvin*, 118 Pa. St. 230; *Warner v. New York Central*, 44 N. Y. 465. The court erred in refusing to strike out the testimony of Dr. Lufkin as to his opinion that there was possibly injury to the structure underneath the ribs, possibly the liver. Dr. Lufkin was not called for the purpose of treatment, but for the purpose of preparing himself for trial. His testimony was based on the unsworn statement of the plaintiff outside of court. The testimony of the physician under those circumstances is based upon the most unreliable of hearsay testimony, and for that reason his opinion should have been excluded. *Stewart v. Everts*, 76 Wis. 35; *Abbot v. Heath*, 84 Wis. 314; *Illinois C. R. Co. v. Sutton*, 42 Ill. 438; *Roosa v. Boston L. Co.*, 132 Mass. 439; *Heald v. Thing*, 45 Me. 392; *Quaife v. Chicago & N. W. R. Co.*, 48 Wis. 513; *Kreuziger v. Chicago & N. W. R. Co.*, 73 Wis. 158; *Rowland v. Philadelphia & B. R. Co.*, 63 Conn. 415; *Davidson v. Cornell*, 132 N. Y. 228; *Jones v. Portland*, 88 Mich. 598; *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537; *Darrigan v. New York & N. E. R. Co.*, 52 Conn. 285; *A., T. & S. F. R. Co. v. Frazier*, 27 Kan. 463; *Miller v. St. Paul C. R. Co.*, 62 Minn. 216; *Williams v. Great Northern Ry. Co.*, 68 Minn. 55.

Samuel A. Anderson and C. D. O'Brien, for respondent.

START, C. J.

The plaintiff was a passenger on one of the defendant's cars, which collided with a freight train of a steam railway, and this action was brought to recover for injuries which she claimed to

have sustained in the collision by reason of the negligence of the defendant's motorman on the car. Verdict for the plaintiff for \$2,750, and the defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict, or for a new trial.

1. The negligence of the motorman is practically conceded, but the defendant claims that the evidence did not show that such negligence was the cause of plaintiff's injury. There is little or no direct evidence on the point, but the circumstantial evidence is not only sufficient to sustain the verdict on this point, but it is substantially conclusive. Many men have been rightly convicted of felonies on less satisfactory evidence.

2. A witness for the plaintiff, who was on the car at the time of the injury, testified that he noticed that the motorman, when he got a bell to stop, would turn on the electricity instead of turning it off, and then turn it back again; that he noticed this several times. The defendant moved to strike out the evidence, as immaterial and not connected with the accident. The motion was denied, and exception taken. On his cross-examination the witness stated that it was a long way from the crossing at which the collision occurred; that he observed the motorman turn on the current when he got a bell to stop, but that it was on the same trip, and that he observed it at different times before the crossing was reached. The motion to strike out the evidence was renewed, and there was the same ruling and exception as before. This ruling is assigned as error.

At the time this evidence was given, the negligence of the motorman in managing the car was at issue. The plaintiff had introduced evidence tending to prove such negligence, in that he failed seasonably to stop the car so as to avoid the collision with the freight train. The evidence objected to was not as to the general incompetency of the motorman, or that he had been negligent on a previous occasion, but it was as to his management of the car as he drove it on towards the crossing. In these respects it would seem that the case may be distinguished from *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438, 74 N. W. 166, and other cases relied on by the defendant. But without so deciding it is clear that,

if the refusal to strike out the evidence was erroneous, it was not reversible error; for the negligence of the motorman was conclusively established, independent of this evidence, and the jury instructed that the case was not one for exemplary damages.

3. Upon the trial the plaintiff called a physician and surgeon, Dr. Lufkin, who had made a physical examination of her, so as to qualify him to testify as an expert. In answer to a question calling for his opinion as to her injury, he answered, without objection, as follows: "My opinion is that there was possibly injury to the structures underneath the ribs, possibly the liver, the covering of the liver." The defendant claims that it was made to appear by his cross-examination that this opinion was based on hearsay statements, and that the court erred in denying its motion to strike it out.

The witness testified in chief that he knew nothing of his patient, save what was before him, and had no history of the case whatever, and that he made the examination before he asked about the cause of any injury, for fear of being prejudiced. On the cross-examination he testified that he arrived at his conclusion upon his examination of the plaintiff, and the facts stated by her; and, further, "my opinion was arrived at entirely through my own examination, and what I elicited during that examination from the patient." The record fails to disclose that upon the examination the doctor elicited from the patient any fact or statement as to any past event, or as to her injury or past condition, or any fact not proper to be considered by him, in connection with the examination, in reaching a conclusion. The cross-examination did not go far enough to make this appear. It was not error for the court to refuse to strike out the evidence.

4. The last matter to be considered is the question of damages. The expert evidence is conflicting as to the extent of plaintiff's injury. Drs. Whitney and Dinwoodie, called by the plaintiff, testified in substance that her tenth rib was torn loose from the cartilage, and that there also seemed to be some injury to the rib above; that the injury to the rib has healed, but that neuralgia of the tenth intercostal nerve had resulted; and they gave it as their opinion that she will never be as well as before the injury,

and that she will always have a weak side. No definite opinion was expressed as to the probability of the neuralgia being permanent. The opinion of the third and last expert called by the plaintiff, Dr. Lufkin, we have already quoted. He also expressed the opinion that the injury had left trouble behind it of a severe character. The defendant called Drs. Wheaton and Ritchie, who had examined the plaintiff; and they severally testified to the effect that they were unable to find any evidence of abnormal conditions in the plaintiff's side or chest, or that there had been a separation of the rib from the cartilage.

The testimony of the plaintiff and her family tended to show that she was strong and healthy before the injury, and never had had any trouble with her side; that, when she regained consciousness after the collision in which she was injured, her leg was bruised and lame, and her side felt as if it had been crushed; that she walked to the Fair Grounds after the accident,—half a mile away, —but became sick and dizzy, and was taken home, and was under the care of her physician for two weeks; that it was five weeks before the separation healed; that she still suffers frequent and severe pains, and is unable to do washing, sweeping, sewing, or any other work which she was accustomed to do before the injury, except light household work. This was her physical condition as testified to by herself and others at the time of the trial of this action, some nine months after the injury. She was 35 years old at that time, and the mother of six children.

The evidence on the part of the plaintiff as to her injuries was sufficient, if satisfactory to the jury, to sustain a finding that she will never wholly recover from the physical effects of the injury, and that as long as she lives she must endure more or less pain, and that she has been partially incapacitated thereby for life's work and duty. The fact that at the time of the trial, some months after her wound had healed, her physical condition was such as claimed increases the probability that the effect of the injury will be, to some extent at least, permanent. While we are not wholly satisfied with the verdict, and believe that the ends of justice would have been better served if the damages had been assessed in an amount at least one-fourth less than they were, still the evidence

does not justify the conclusion that the damages were given under the influence of passion or prejudice, and we have no right to substitute our judgment for that of the jury.

Order affirmed.

WILLIAM N. CUMBEY v. ANDREAS UELAND.

June 6, 1898.

Nos. 11,002—(73).

Insolvency—Transfer of Notes by way of Preference—Renewal of Notes by Preferred Creditor—Conversion.

An insolvent debtor transferred and indorsed to his creditor, a bank, two promissory notes of a third party, to be applied as a payment on his indebtedness to it. The transaction was a preference, and nine days thereafter the debtor made an assignment in insolvency. When the notes matured the maker thereof was solvent, but the bank, instead of collecting them, took new notes therefor, signed by the maker only, payable to itself, due in the future, and surrendered the original notes. Afterwards both the maker of the notes and the bank became insolvent, and a receiver was appointed for the latter. The renewal notes were never paid. The assignee of the debtor presented a claim against the estate of the bank for the value of the notes so received as a preference, renewed and surrendered by it. *Held*, that the bank, as against the assignee, converted the notes to its own use, and that its receiver was not entitled to return the renewals to the assignee in discharge of its liability.

Same—Election of Remedies—Estoppel.

Held, that neither the doctrine of election of remedies nor of estoppel has any application to the facts of this case.

Appeal by Andreas Ueland, as receiver of Washington Bank, from an order of the district court for Hennepin county, Johnson, J., allowing a claim for \$11,422 against the estate of said bank in favor of William N. Cumbe, as assignee of Weitzner, Gruenberg & Co., insolvents. Affirmed.

A. Ueland, for appellant.

A transfer of property by way of preference is not unlawful in the same sense as a fraudulent sale, but the creditor has a right

to receive and hold the property until an assignee or receiver under the insolvent act asserts a claim to it. *Mackellar v. Pillsbury*, 48 Minn. 396; *Fisher v. Utendorfer*, 68 Minn. 227. The property itself must be recovered, and only when this cannot be done, its value. *Clerihew v. West Side Bank*, 50 Minn. 538. Hence a demand for the property by the assignee is the foundation of his right to sue for the property, and a refusal to comply with such demand is the basis for charging a conversion of it. *Hay v. Tuttle*, 67 Minn. 56. The bank must be found always to have dealt lawfully with the notes, for the assignee evinced no desire to have them, or anything on account of them, before he made his claim in the receivership. If the bank's receiver could have tendered the original notes the assignee would have had no other claim. The assignee has no right to refuse to take the renewal notes instead of the originals. The real thing—the property—is the debt. The notes are only the evidence. *Bragg v. Gaynor*, 85 Wis. 468, 487; *Owen v. Miller*, 10 Oh. St. 136, 144. Substituting for a debt one kind of evidence in place of another is not conversion. *School District v. Zink*, 25 Wis. 636. If the taking of renewal notes was a conversion, it was only so in a technical sense. But the courts disregard technical conversions, and refuse to hold the party so charged for the value of the property if he offers to turn it over. *Rutland & W. R. Co. v. Bank*, 32 Vt. 639; *Bucklin v. Beals*, 38 Vt. 653; *Churchill v. Welsh*, 47 Wis. 39; *Acraman v. Cooper*, 10 M. & W. 584; *Carpenter v. American B. & L. Assn.*, 54 Minn. 403.

When the assignee brought suit to hold the bank as a fraudulent vendee for the conversion of the merchandise for which the notes were given, he thereby attacked the validity of the debt and of the notes, and elected his remedy. He should not be allowed afterwards to assert a claim on a conflicting theory. *Farwell v. Myers*, 59 Mich. 179; *Thomas v. Watt*, 104 Mich. 201. He had his election to demand the notes, which would have conceded the validity of the sale, or to attack the sale. but he could not do both. *Hathaway v. Brown*, 22 Minn. 214. The assignee is estopped from charging a conversion of the consideration of the sale while he was prosecuting a claim for the property sold.

A. B. Jackson, for respondent.

The preferential transfer when ascertained and adjudged to be void was void as of the date it was made, and the bank was therefore chargeable with the value of the use of the property and also for any damage or waste done to the property while in its possession. *Thompson v. Johnson*, 55 Minn. 515. The course pursued by the bank with the notes constituted a conversion. 4 Am. & Eng. Enc. 108; *Hossfeldt v. Dill*, 28 Minn. 469; *Cooley*, Torts, 448; *Harris v. Cable*, 104 Mich. 365. The debt now held by the bank is not the same debt evidenced by the original notes. *Childs v. Pellett*, 102 Mich. 558. The mere attempt to pursue a remedy or claim a right to which a party is not entitled, without obtaining any legal satisfaction therefrom, will not deprive him of the benefit of that which he had originally a right to resort to. *In re Van Norman*, 41 Minn. 494; *Mills v. Parkhurst*, 126 N. Y. 89; *Crossman v. Universal R. Co.*, 127 N. Y. 34; *Johnson-Brinkman C. Co. v. Missouri P. R. Co.*, 126 Mo. 344; *Smith v. Bricker*, 86 Iowa, 285. There was no estoppel.

START, C. J.

The here material facts, as disclosed by the record, are: On March 18, 1895, the firm of Weitzner, Gruenberg & Co. transferred its stock of merchandise to Peter P. Swensen, and received therefor his two promissory notes for \$5,000 each, with interest at 8 per cent. per annum, due in four and six months, respectively. The firm indorsed and transferred these notes to the Washington Bank, which was then a creditor of the firm to the amount of about \$23,000, to be applied as a payment on such indebtedness. The firm was then insolvent, to the knowledge of the bank, and the notes were so transferred with intent to prefer the bank, and such transfer was a preference within the meaning of the insolvency law of the state. When the notes were transferred and matured, the maker thereof, Swensen, was solvent, and the notes could then have been collected from him. They were never paid, but the bank renewed them at maturity, taking therefor new notes signed by Swensen and surrendering the notes so indorsed and transferred

to the bank. Interest was paid on the notes by the checks of Swensen to the amount of \$739.99.

Shortly after the transfer of the notes to the bank, and on March 27, 1895, the firm made an assignment of its property for the benefit of its creditors, pursuant to the insolvency law, to Frank W. Davis, and the respondent was appointed assignee in his place, April 2, 1895, and is still such assignee. After the bank had so surrendered the notes, and taken new notes from Swensen in place thereof, the respondent, as assignee, commenced an action against Swensen, the bank, and the firm to set aside the transfer of the merchandise of the firm to Swensen, claiming that it had been made to defraud creditors and for the purpose of securing a preference to the bank. Thereafter, and before this action was tried, Swensen made an assignment in insolvency, and the bank proved a claim against his estate on account of the renewal notes, which was allowed. The bank became insolvent, and the appellant was appointed receiver thereof December 26, 1896. The respondent thereafter dismissed his action, and presented his claim to the receiver of the bank for the full value and interest of the two notes transferred to it by his assignors as a preference. The claim was disallowed, but the receiver at the same time offered to turn over the renewal notes, the claim against Swensen's estate, and cash to cover the interest for which checks had been taken. No demand for the notes was made either of the bank or receiver before the claim was made in the receivership.

After the receiver disallowed the claim, the matter was brought before the district court by motion, no objection being made to the procedure, and the court made its order allowing the claim against the estate of the bank to the extent of the value of the notes respectively at the date of the maturity and surrender of each to the maker. The receiver appealed from this order. He here claims that the order was erroneous, because (a) the bank did not convert the notes to its own use, but, if it did, the conversion was technical, and should be disregarded; (b) the assignee elected his remedy when he sued for the merchandise which was the consideration for the notes, and should not now be permitted to pursue

another and inconsistent remedy; (c) he is estopped from claiming a conversion of the notes.

1. The important question in this case is whether the Washington Bank actually converted the Swensen notes. The transfer of the notes was valid as between the parties to the transaction, but voidable at the instance of the assignee. His remedy was to demand a return of the notes, and he is not entitled to their value unless the bank actually converted them. *Clerihew v. West Side Bank*, 50 Minn. 538, 52 N. W. 967; *Hay v. Tuttle*, 67 Minn. 56, 69 N. W. 696. But this rule does not mean that a creditor of an insolvent receiving property as a preference may use it so as to make material gains out of it, or permit it by his negligence to become seriously depreciated in value, and then return it in its depreciated or worthless condition to the assignee in full discharge of his liability. A judgment declaring a preferential transfer void relates back to its date, so that the transferee may be charged with the value of the use of the property and for damages to it while in his possession. *Thompson v. Johnson*, 55 Minn. 515, 57 N. W. 223. The maker of the notes being solvent when they matured, and the notes of the actual value of the amount then due thereon, and the bank having renewed them for its own benefit or to accommodate the maker, it ought not to be allowed to tender back the comparatively worthless renewals in discharge of its liability. We, however, place our decision in this case upon the broad ground that there was, as against the assignee, an actual conversion of the notes.

The firm of Weitzner, Gruenberg & Co., the transferrer of the notes, made an assignment in insolvency nine days after this preference was made, and thereafter the bank held the notes subject to the right of the assignee to avoid the preference. They were then no longer the absolute property of the bank, but it held them contingently as trustee for the assignee; that is, for him in case he called for them. The bank treated the notes as if they were its absolute property, dealt with and exercised dominion over them in a manner inconsistent with the rights therein of the assignee, and voluntarily put it beyond its power to restore to the assignee that which he was entitled to in case he called for it. By the renewal

of the notes, and the extension thereby of the time of payment of the debt, instead of collecting it, and by surrendering the original notes and taking in place thereof other notes essentially different as to parties and time of payment, the bank exercised acts of dominion over the notes and the debt of which they were the evidence wholly inconsistent with the rights of the assignee. This was an actual conversion. *Cooley, Torts*, 448; *Hossfeldt v. Dill*, 28 Minn. 475, 10 N. W. 781.

If the assignee had demanded the original notes when they became due, and the bank had tendered him the renewals, evidencing a debt not due and not collectible until some future time, would he have been bound to accept them as a satisfaction of his demand? Would he not have had the legal right to say: "The notes I demand are now due, the maker is solvent, whatever may be the case as to the indorser, and I can now collect the debt if I can obtain the notes; but you have dealt with them as your own; you have placed it beyond your power to give me the notes or transfer to me the debt which they represent, so that I may collect it; therefore I decline to receive these other notes which you tender, and assume the risk of the continuing solvency of the maker?" And would not the assignee then have been entitled to recover from the bank the value of the notes, on the ground that it had actually converted them to its own use? These questions can be answered only in the affirmative. The fact that the assignee did not make such a demand cannot change the quality or modify the legal effect of the previous acts of the bank in dealing with the notes as its absolute property.

2. The doctrine of election of remedies has no application to the facts of this case. The mere fact that the assignee brought an action claiming to recover the merchandise which was the consideration for which the notes were given, and dismissed the action before trial without having obtained any relief therein, does not disentitle him to recover the notes from the bank as a preference. In *re Van Norman*, 41 Minn. 494, 43 N. W. 334; *Marshall v. Gilman*, 52 Minn. 88, 53 N. W. 811.

3. The assignee is not estopped in this case from claiming that the transfer of the notes to the bank was a preference by the fact

that he commenced an action to recover the merchandise for which they were given. The action was not commenced until long after the bank had converted the notes to its own use by renewing them.

Order affirmed.

FRANK ALLEN v. THOMAS BROWN.

June 6, 1898.

Nos. 11,055—(68).

Continuance—Discretion of Court—Action for Work and Labor.

Held, that the trial court did not abuse its discretion in denying defendant's motion for a continuance, and that the evidence sustains the verdict.

Appeal by defendant from an order of the district court for Fari-bault county, Quinn, J., denying a motion for a new trial, after a verdict in favor of plaintiff for \$312.55. Affirmed.

B. G. Reynolds, for appellant.

W. R. Geddes, for respondent.

PER CURIAM.

The plaintiff is a minor, and brought this action, by his guardian ad litem, to recover the reasonable value of work and labor performed by him, as a farm laborer for the defendant, for the term of 22½ months. The answer alleges that the defendant received plaintiff into his house upon the express agreement made with him and Andrew Nesbitt, in whose charge and keeping the plaintiff then was, to the effect that the defendant should give the plaintiff a home and furnish him with his board and clothes in consideration of what work he might do for the defendant; that the services sued for were rendered pursuant to such contract, and that their reasonable value was less than the board and clothes furnished to the plaintiff by the defendant. The reply denied the making of any contract for plaintiff's services, and alleged that, if Nesbitt attempted to make such a contract, he did so without right or authority. The plaintiff had a verdict, and the defendant appealed from an order denying his motion for a new trial.

1. The defendant's first assignment of error is that the trial court erred in denying his motion for a continuance on account of the absence of a witness, Andrew Nesbitt, who it was claimed would give testimony tending to establish the contract set up in the answer. Waiving the objection of the plaintiff that the proposed testimony of Nesbitt was immaterial, for the reason that there was no showing or claim that he was the general guardian of the plaintiff, or had any authority to make a contract for him, we are of the opinion that the trial court properly exercised its discretion in denying the motion.

The record shows: That the case was on the calendar for trial at the January, 1897, term of the court, and was then continued, on the application of the defendant and consent of plaintiff, to the next term of the court, appointed to be held June 1, 1897. On the first day of the next term the motion was made, and it appeared from the affidavits upon which it was based that Nesbitt lived at Colgate, North Dakota, and that defendant knew his residence. That on May 25, 1897, and not before, the defendant's attorney gave notice of the taking of Nesbitt's deposition before a notary public at Hope, North Dakota, on May 30, which was Sunday. On May 27 the attorney discovered the mistake, and served a new notice for taking the deposition on June 3. The only excuse offered why steps were not sooner taken to secure the testimony is that the attorney was engaged from May 1 to May 24 in efforts to ascertain by correspondence the name of a notary before whom the deposition could be taken. The sufficiency of the excuse, and the degree of diligence it indicated, were questions for the trial court; and it did not err in denying the continuance.

2. The reception in evidence, over the defendant's objection, of plaintiff's account of the clothes and money he had received from the defendant was not reversible error. The evidence tends to show, and is sufficient to establish the fact, that the plaintiff correctly put the items down in pencil in a book, and afterwards copied them in ink upon a sheet of paper, and that afterwards the book was lost. The account, as it appeared on this sheet of paper, which was received in evidence, did not contain any debit items or charges against the defendant whatever. It was simply an account

of the items of clothing and their value, and the money which the plaintiff conceded that he had received from the defendant, and was given in evidence as a part of the plaintiff's original case in connection with his testimony.

3. The verdict is sustained by the evidence.

Order affirmed.

C. E. THORNE v. G. L. ALLEN.

June 7, 1898.

Nos. 10,664—(185).

Farming on Shares—Lien for Advances—Chattel Mortgage—Division of Crop—Replevin—Waiver of Lien—Application of Payment.

The plaintiff held a chattel mortgage on defendant's grain, and also held possession of the grain under a lien given to him to secure other advances made by him to defendant. Plaintiff, with defendant's consent, sold a part of the grain for \$80, and retained the proceeds; but no application of them was expressly made by either party to the payment of the one debt or the other. Thereafter plaintiff surrendered the possession of the balance of the grain to defendant, and thereby waived his said lien, but still retained his said mortgage on the grain. Thereafter plaintiff brought replevin for the grain, and, on the trial, sought to apply the \$80 in payment of the sum due for such other advances, and defendant sought to apply the same in payment of the mortgage debt. *Held*, it would be inequitable, after plaintiff had voluntarily relinquished his said lien, to apply the \$80 on the mortgage debt, and that the same ought to be applied in payment of the sum due for the advances.

Appeal by plaintiff from an order of the district court for Wilkin county, C. L. Brown, J., denying a motion for judgment notwithstanding the verdict, or for a new trial. *Reversed*.

Henry G. Wycell and Lyman B. Everdell, for appellant.

Matheus & Wood, for respondent.

CANTY, J.

The plaintiff let his farm to the defendant "on shares" for the season or year 1895, and sold to him certain live stock on credit for the sum of \$300. By the contract of letting, defendant agreed to cultivate the farm, and it was agreed that plaintiff should

have one-third and defendant two-thirds of the crops, but that the title to the crops should remain in plaintiff until division thereof, and that plaintiff should have the right to take and hold a sufficient portion of the share "that would, on the division of said crops, belong" to defendant to pay any and all advances made to him by plaintiff. The price of the live stock so sold was secured by a chattel mortgage executed by defendant to plaintiff on this and other stock, and on all defendant's share of the crops to be grown on this farm during the year 1895. The contract and chattel mortgage were both dated October 2, 1894. Defendant cultivated the farm, and in December, 1895, plaintiff brought this action to recover possession of all of said mortgaged live stock and 1,150 bushels of wheat and 1,240 bushels of oats raised on the farm.

On the trial, defendant had a verdict for the return of the property which had been taken in the action by plaintiff or for \$973.20, the value thereof, in case a return cannot be had. On a motion for a new trial, the defendant remitted all of said sum in excess of \$900, and from an order reducing the verdict accordingly, and denying a new trial, plaintiff appeals.

On the trial, plaintiff gave evidence tending to prove that defendant was indebted to him in the amount of several hundred dollars for advances (not covered by the chattel mortgage); and he claimed that he was entitled to the possession of the grain in question under the farm contract as security for these advances, as well as under the chattel mortgage as security for the mortgage debt. To defeat plaintiff's claim to this grain under the farm contract, defendant introduced evidence tending to prove that, prior to the commencement of the action, the parties had divided the grain, and that all of the grain here in question had been delivered by plaintiff to defendant as a part of the share of the latter. On this evidence the jury were warranted in finding that plaintiff had waived and lost his lien on the grain in question under the farm contract, and they have so found.

Plaintiff's other claim to this grain is that which he made under his chattel mortgage. The evidence tends to prove that the threshing of the grain raised on the farm was done at three different times, and that most of the wheat threshed at the first two

times was taken away by plaintiff from the threshing machine, and sold at the elevator without division; that plaintiff afterwards reported to defendant the latter's share of the price received; and that his share of the price received for the wheat sold at the second threshing was \$80. So far as appears, neither party made any express application of this payment of \$80 until the time of the trial of this action, when plaintiff sought to apply it in payment of said advances secured only by said farm contract, and defendant sought to apply it in payment of the mortgage debt. The court ruled that defendant might apply it in payment of the mortgage debt, and so charged the jury. This is assigned as error.

It will be observed that, when plaintiff sold the wheat represented by this \$80, he held it under the lien given him by the farm contract, as well as under the chattel mortgage. A payment made from the proceeds of mortgaged property in the possession of the mortgagee must, as a general rule, be applied in payment of the mortgage debt. 2 Am. & Eng. Enc. (2d Ed.) 466. But the rule is equally strong that the proceeds of property held by a bailee on a lien must be applied to the satisfaction of the lien. *Id.* It was the grain threshed at the third threshing that was divided, of which defendant's share was delivered to him, as aforesaid. Plaintiff's lien on this grain under the farm contract was thereby divested. Plaintiff had thus voluntarily abandoned his lien under the farm contract after he had received the \$80, and is it just or equitable to allow defendant afterwards to apply the \$80 on the mortgage debt?

"In directing an application [of payment], the court will look first to the intention of the parties in making and receiving the payment; and it will not generally exercise its power to direct an application according to its own notion of justice and equity, so long as any intention of the parties to apply the payment can be ascertained with reasonable certainty." *Id.* 447.

"The intention to make a certain application of a payment may be implied from the circumstances attending the transaction. The intention to make the application may be implied from the conduct of the parties, either at the time of making and receiving payment, or thereafter. Application of a payment may be implied from the course of dealing between the parties, or facts and circumstances which imply a course of dealing." *Id.* 450, 451. .

"When neither the debtor nor the creditor has manifested an in-

tention to make application of a payment, and no such intention can properly be deduced from all the circumstances of the case, the court will direct the application equitably to all parties concerned. This rule is necessarily a universal one, and, while all of the courts profess to recognize it to some extent, yet the question of what rules, if any, should be generally followed in order to arrive at an equitable application is attended with much contrariety of judicial opinion. How the application shall be made when no intention of the parties appears is a question of law, which should not be left to the determination of the jury. A large number of the authorities hold that the court should direct application, where no intention appears, according to the presumed intention of the parties. Those authorities that follow the rules of the civil law on this subject hold that, in directing the application of payments, the court is bound to carry out the presumed intention of the debtor." *Id.* 452-454.

"A great number of the authorities, following a strict construction of the common-law rule in favor of the creditor, hold that undirected payments should be applied by the court in a manner best calculated to preserve the interests of the creditor." *Id.* 455.

The rule which favors the debtor may be applied in proper instances where it will work equity, and the rule which favors the creditor may be applied in proper instances where it will work equity, but neither of these rules should be carried to an extreme or unreasonable length. It is clear that the defendant never attempted to make any application of this \$80 payment until the time of the trial. Whether, from the conduct of the plaintiff in involuntarily releasing his lien under the farm contract, it can be held that he intended to apply, and did apply, the \$80 as a payment on the advances secured by that contract, we need not consider. If it is a case where no application of the payment was made by either party, "the court will direct the application equitably to all parties concerned." Then, we are of the opinion that it is not now equitable to apply the \$80 payment to the mortgage debt, or to allow the defendant so to apply it. After plaintiff has voluntarily surrendered a part of his security, it is not equitable so to apply this payment as to destroy the rest of his security.

This disposes of the case, and the order appealed from should be reversed, and a new trial granted. So ordered.

JULIUS H. SHAW and Another v. CHARLES FJELLMAN and Others.

72 465
174 33

June 7, 1898.

Nos. 10,989—(141).

Contract for Heating Plant—Guaranty to Maintain—Repairs after Completion—Filing of Lien Statement within 90 Days.

The contractor agreed to construct "a plumbing and heating plant" in the building, keep and maintain the plant in good order for one year after it was completed, and execute a written guaranty to that effect. In consideration thereof, the owner of the property agreed to pay the contractor a certain sum at the end of such year. The latter performed the contract, and, in doing so, made repairs three times during such year after the plant was completed, the last time being on the last day of the year. The lien statement was filed within 90 days thereafter. *Held*, as against such owner, the contract is an entirety, and the lien statement was filed in time, although as against third parties acquiring rights in the property for value after the completion of the plant, and without actual notice or knowledge of the contract, it is not an entirety, and the lien statement is not filed in time.

Same—Innocent Purchaser or Incumbrancer—Burden of Proof.

But *held*, it does not appear that the respondents are innocent purchasers or incumbrancers for value, without notice.

Appeal by plaintiffs from an order of the district court for Hennepin county, Simpson, J., sustaining the separate demurrers of defendants Busch and Anheuser-Busch Brewing Association to the complaint. Reversed.

Merrick & Merrick, for appellants.

Counsel cited Frankoviz v. Smith, 34 Minn. 403; Scheible v. Schickler, 63 Minn. 471; Hubbard v. Brown, 8 Allen, 590; Turner v. Wentworth, 119 Mass. 459; Monaghan v. Putney, 161 Mass. 338; St. Louis v. O'Reilly, 85 Ill. 546; Northern v. Cleaveland, 129 Mass. 570; McIntyre v. Trautner, 63 Cal. 429; Waganstein v. Jones, 61 Minn. 262; Jeffersonville v. Riter, 138 Ind. 170.

Welch, Hayne & Hubachek, for respondents.

Counsel cited Harrison v. Homeopathic, 134 Pa. St. 558; Berry v.

Turner, 45 Wis. 105; Avery v. Butler, 30 Ore. 287; Flenniken v. Liscoe, 64 Minn. 269.

CANTY, J.

This is an action to foreclose a mechanic's lien, and the question raised is whether the lien statement was filed within the statutory time.

The complaint alleges that the defendant Fjellman was the owner of the land on which he was erecting a building; that on March 30, 1895, he entered into an agreement with plaintiffs whereby it was agreed that they should furnish, place, and construct "a full and complete plumbing and heating plant" in the building, complete said plant in a good and workmanlike manner, "keep and maintain the same in good and perfect condition and running order for one year from the date of the completion" of the same and of its acceptance by Fjellman, and execute to him a written guaranty to that effect, and that, in consideration thereof, he agreed that at the end of such year, on the full performance by plaintiffs of said contract on their part, he would pay them the sum of \$1,075; that plaintiffs commenced the construction of said plant March 31, 1895, and the same was completed December 31, 1895, and accepted by Fjellman January 10, 1896; that on the latter date plaintiffs executed a written guaranty pursuant to the contract, and, in performance and fulfilment of the same during the year in which said guaranty was in force, furnished labor and material rendered necessary in order to maintain the plant and keep it in repair; that said repairs were furnished January 8, 1896, November 19, 1896, and December 31, 1896, all of which are set out in a bill of particulars made a part of the complaint. The lien statement was filed March 13, 1897.

It is further alleged that the defendants Busch and Anheuser-Busch Brewing Association claim some interest in the property superior to the right of plaintiffs. These two defendants demurred to the complaint on the ground that it does not state a cause of action; and from an order sustaining the demurrer, plaintiffs appeal.

The statute (G. S. 1894, § 6236) requires the lien statement to be filed within 90 days after the time of furnishing the last item

of the labor or material, and respondents contend that in this case the lien statement was not filed within the 90 days; that, in order to preserve a lien for the labor and material furnished in constructing the plant, a lien statement therefor should have been filed within 90 days after the same was completed; and that the time for filing the lien statement for the same cannot be extended by reason of the labor and material furnished in maintaining the plant and keeping it in repair afterwards.

As against Fjellman, who made the contract, the lien statement was in our opinion filed in time. Of course, the stipulation for maintaining the plant for one year did not of itself extend the time for filing the lien. On the contrary, this extension of the time of payment, if no additional labor or material had been furnished, would have waived the right to a lien for what had been done. *Flenniken v. Liscoe*, 64 Minn. 269, 66 N. W. 979. But, when plaintiffs entered into the contract, they took their chances as to whether or not it would be necessary to furnish, during the year, additional labor or material for which a lien might be claimed, and, if none was so furnished within 90 days of the end of the year, the lien for the whole claim would be waived.

The contract to construct the plant, and maintain it for one year after it was constructed, was, as between plaintiffs and Fjellman, one entire contract, even though it provided that a written guaranty should be executed when the original construction was completed. As against Fjellman, who made the contract, it is an entirety, and the lien statement was, as against him, filed in time to preserve the lien for the whole claim. But as to an innocent third party, who, after the plant was completed, acquired an interest in the property without actual notice or knowledge of the character of the contract, it should be regarded as in fact two separate contracts, one of which was to be completely performed before the other was to be commenced, and, as to such third party, the lien statement was not filed in time. If by one contract A. should employ B. to construct a house on the land of the former, and at the end of six months, after the house was fully completed, to commence the construction of a barn on the same land, and thereafter construct the same, it might be an entire contract, as between the

parties, requiring the filing of but one lien statement, while as to third parties it might for some purposes be regarded as two separate transactions, so that the time for filing the lien statement for each job or transaction would commence to run from the time of completing the same. The same principle may apply in this case.

As against a mechanic's lien, the rights of subsequent purchasers and incumbrancers are not, as a general rule, any greater than the rights of the owner who contracted for the improvement. But there are exceptions to this rule. Thus after it was supposed that the work had been completed, and it was accepted or taken possession of by the owner, he or his agent might extend the time for filing the lien by requiring additional work to be done to remedy defects subsequently discovered, and the time for filing the lien would commence to run from the completion of such additional work. *National v. O'Reilly*, 85 Ill. 546; *Jeffersonville v. Riter*, 138 Ind. 170, 37 N. E. 652; *McIntyre v. Trautner*, 63 Cal. 429. But after the work has been apparently completed, and all further work has ceased for an unreasonable length of time, and in the meantime a third party has acquired a right or interest in good faith for a valuable consideration, the owner who made the contract may thereafter waive his own rights, and extend, as against himself, the time for filing a lien by consenting to the performance of further work to remedy such defects; but he cannot waive the rights of such third party, or extend the time of filing a lien as against him. *Nichols v. Culver*, 51 Conn. 177; *Cole v. Uhl*, 46 Conn. 296; *Sanford v. Frost*, 41 Conn. 617; *Conlee v. Clark*, 14 Ind. App. 205.

In our opinion, the same principles apply here. But the burden is on these respondents to show that they are innocent purchasers or incumbrancers for value without notice; and, until that appears, they stand in no better position than Fjellman himself. The case at bar is in principle much like *Northern v. Cleaveland*, 129 Mass. 570, which we cited with approval in *Scheible v. Schickler*, 63 Minn. 471, 65 N. W. 920.

This disposes of the case, and the order appealed from is reversed.

HARRY RIFLEY v. MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY.

June 7, 1898.

Nos. 11,137—(159).

Railway—Injury to Switchman—Snow and Ice between Yard Tracks—Negligence for the Jury.

Plaintiff, a switchman, while employed by defendant in its yards in Minneapolis, slipped on a narrow ridge of ice between the rails of the track, fell, was struck by a moving car, and was injured. The ridge of ice was about two inches higher than the rails, was concealed by a covering of fresh snow, and had been in this condition about a week before the injury. In an action to recover damages for the injury, *held*, it is a question for the jury whether or not defendant was guilty of negligence in failing to keep its yard in a reasonably safe condition.

Same—Contributory Negligence for the Jury.

Whether plaintiff was guilty of contributory negligence in walking along ahead of a slowly-moving car to adjust the coupling on the same, so as to couple it to another car, *held* a question for the jury.

Same—Walking Ahead of Moving Car—Evidence of Custom.

Evidence that it was, and long had been, customary for defendant's brakemen and switchmen thus to walk ahead of the moving car when adjusting the coupling, *held* competent.

Appeal by defendant from an order of the district court for Hennepin county, Tarbox, J., denying a motion for a new trial, after a verdict in favor of plaintiff for \$2,000. *Affirmed*.

Albert E. Clarke and *Wilbur F. Booth*, for appellant.

The condition of the roadbed as it existed at the time of the accident was one of the risks of employment. *Henkes v. City of Minneapolis*, 42 Minn. 530; *Wright v. City of St. Cloud*, 54 Minn. 97; *Blais v. Minneapolis & St. L. Ry. Co.*, 34 Minn. 57; *Stacey v. Winona & St. P. R. Co.*, 42 Minn. 160; *Dowell v. Burlington*, 62 Iowa, 629; *Brown v. Chicago*, 64 Iowa, 652; *Piquegno v. Chicago*, 52 Mich. 40. Plaintiff had at least means of knowing the condition of the track and the possibility of danger from the existence of ice underneath the snow, and hence was not entitled to recover. 3 Woods, R. R.

§ 379; *Texas v. Rogers*, 57 Fed. 378. Plaintiff was guilty of negligence which contributed to the injury. Where there are two ways of doing a thing, one safe and the other dangerous, and a person voluntarily adopts the dangerous method, he cannot recover for any injury resulting from adopting the dangerous method. *Chicago v. Rush*, 84 Ill. 570; *Chicago v. Bliss*, 6 Ill. App. 411; *Pierce, R. R.* 377; *Glover v. Scotten*, 82 Mich. 369; *Chicago v. Davis*, 53 Fed. 61; *Cunningham v. Chicago, M. & St. P. Ry. Co. (U. S. C. C.)* 12 Am. & Eng. R. Cas. 217; *Novock v. Michigan*, 63 Mich. 121. The evidence of custom was inadmissible. Where the method of doing certain work is obviously dangerous, testimony that it is the customary method is never admissible. *Thompson v. Boston*, 153 Mass. 391; *Andrews v. Birmingham*, 99 Ala. 438; *Benage v. Lake Shore*, 102 Mich. 79; *Loranger v. Lake Shore*, 104 Mich. 80; *Kroy v. Chicago*, 32 Iowa, 357; *Larson v. Ring*, 43 Minn. 88.

F. D. Larrabee, for respondent.

CANTY, J.

Plaintiff was in the employ of defendant as a switchman, and was at work in its yards at Minneapolis. The switch engine was pushing several cars ahead of it on the lead track, for the purpose of coupling the car furthest ahead to another car standing on one of the connecting switch tracks. The train was not moving as fast as a man could walk, and plaintiff walked along on the track just in front of said moving car furthest ahead, for the purpose of adjusting the knuckle of the Janney coupler on the front end of that car, so that it could be coupled to said standing car; and while he was thus walking along, adjusting the coupler, he slipped on the track, fell, and his leg was cut off by the moving car. He brought this action to recover damages for the injury. On the trial, he recovered a verdict; and, from an order denying a new trial, defendant appeals.

1. The evidence introduced by plaintiff tends to prove that between the rails of the track on which he was walking there was a narrow ridge of ice, the top of which was about two inches higher than the top of the rails; that, before the ice had formed, the snow had been taken out next to each rail on the inside of the rail, leav-

ing the snow in the middle of the track, where it became wet, and was packed down into a narrow, smooth, high ridge, extending for some distance along the middle of the track; that this ridge became icy, and subsequently a fresh fall of snow covered it over, and presented a level surface, concealing the ice; that the place remained in this condition for about a week prior to the injury; and that plaintiff did not know that there was ice under the snow until he slipped and fell on the ridge of ice, and was injured.

We are of the opinion that, if the jury believed this evidence, they were warranted in finding that defendant was guilty of negligence in failing to keep the place in question a reasonably safe one for its employees to work in. The facts above recited tend much more strongly to prove negligence than did the facts in *Fay v. Chicago, St. P., M. & O. Ry. Co.*, supra, page 192. It may be gathered from the evidence that the railroad yard in Minneapolis, where the injury occurred, is a much more busy place than the yard at St. James, where Fay was killed. More care should be used to keep in safe condition a yard in which a great amount of traffic is handled than a yard in which a small amount of traffic is handled. Besides, the place where Fay fell was covered with level snow, with no concealed ridge of ice under it.

2. We are of the opinion that it was a question for the jury whether or not plaintiff was guilty of contributory negligence in walking ahead of the car, and attempting to adjust the coupling while the car was in motion. See *Lawson v. Truesdale*, 60 Minn. 410, 62 N. W. 546. The evidence tended strongly to prove that it was, and for a long time had been, customary for defendant's employees to walk ahead of the moving cars while adjusting the coupling on the same. The prompt dispatch of business requires railroad brakemen and switchmen to take many risks which the law would declare reckless if taken in some other class of business. Of course, there are risks which even a brakeman or switchman cannot take and be allowed to recover, even if it is customary to take them. But this injury occurred in the daytime. The track appeared to be smooth and safe, and the train was not moving as fast as a man could walk. Under the circumstances, we cannot say,

as a question of law, that plaintiff was guilty of contributory negligence.

3. The evidence of custom was competent.

This disposes of all the questions argued having any merit, and the order appealed from is affirmed.

JOSEPHINE M. SMITH v. CITY OF ST. PAUL and Others.

June 7, 1898.

Nos. 11,159—(143).

Defective Plat—Dedication of Street.

The rule applied that the streets on a defective plat may be dedicated to the public by conveyances made of lots according to the plat.

Same—Description—Location by Extrinsic Evidence.

Held, the plat was not so defective in description that it could not, with competent extrinsic evidence, be located on the ground.

Legal Title by Estoppel—Pleading.

Held, a legal title by estoppel is not a mere equity which must be specially pleaded.

Taxes—Public Street—Void Judgment.

Held, under G. S. 1894, § 1582, a tax judgment for taxes attempted to be assessed on a part of a public street is void for want of jurisdiction.

Same—Taxpayers.

Held, it sufficiently appears that the intervenors are taxpayers.

Trial—Change of Theory—Surprise—Order for Judgment.

The case was tried on one theory, and judgment ordered for plaintiff. *Held*, on the conceded facts, the court was warranted in holding that plaintiff was not taken by surprise when, on a different theory, the court changed its order for judgment, and ordered that plaintiff take nothing by the action.

Vacation of Street—Special Injury—Estoppel by Judgment—Damages for Condemnation—Right of Taxpayer to Prevent Payment.

Held, the intervenor S. is specially injured by the attempt made, through an action in ejectment against the city, to vacate 30 feet in width of the street in front of the lot adjoining hers. S. is therefore not estopped by the judgment against the city in that action, and may, as a general taxpayer, prevent the taking of money out of the city

treasury to pay damages awarded for the 30 feet in condemnation proceedings instituted after such judgment.

No Error in Denying New Trial—Events since First Trial.

Held, the court did not, because of certain facts occurring since the trial, err in denying a new trial.

Appeal by plaintiff from an order of the district court for Ramsey county, Otis, J., denying a motion for a new trial. Affirmed.

Howard L. Smith, for appellant.

Harvey Officer and *Walter L. Chapin*, for respondents.

CANTY, J.

This is the third appeal in this action. See 65 Minn. 295, 68 N. W. 32, and 69 Minn. 276, 72 N. W. 104, 210. It will be seen, by reference to the opinion on the last of the former appeals, that we affirmed the order denying the intervenors a new trial, "but without prejudice, and with leave to appellants to apply to the court below to modify its conclusions of law and order for judgment in accordance with this opinion, or grant a new trial, if, in its discretion, it should see fit to do either."

On the filing of the remittitur in the court below, plaintiff moved for judgment, the intervenors moved that the court modify its conclusions of law and order for judgment "so as to determine that plaintiff is not entitled to any relief in this action, and that judgment be ordered accordingly," and the intervenor Sache moved for leave to amend the prayer of her complaint in intervention "so that it shall ask judgment that the plaintiff, Smith, have no relief and take nothing against the defendant in said action." The court denied plaintiff's motion, and granted the motions of the intervenors. Thereupon plaintiff moved for a new trial, on the grounds (1) of errors in law occurring on the trial, and (2) that the decision is not justified by the evidence, and appeals from an order denying the motion.

1. The plat of West St. Paul proper, mentioned in the last opinion, was never properly executed, acknowledged, or certified to so as to constitute it a legal plat, which would dedicate the streets marked upon it to the public; but those streets were suffi-

ciently dedicated by the owners of the land conveying the same in lots and blocks according to the plat.

2. Neither was this plat so wanting in description that it could not, with the aid of competent extrinsic evidence, be located on the ground. Streets are indicated upon it which it appears by the evidence were, when the deeds were executed, traveled and known by the names given them upon the plat.

3. Neither is there anything in appellant's claim that, by the deed to Sache and the deed to the trust company, each grantee acquired only a title by estoppel to the 30-foot strip in the street in front of such grantee's lot or lots. But conceding that the title so acquired is a title by estoppel, as appellant contends, it does not follow that it is only an equitable title or mere equity, which must be specially pleaded.

4. Appellant offered in evidence on the trial certain tax-title certificates, under which she claims title to parts of the 30-foot strip in question. It is sufficient answer to this claim to say that it appeared on the trial that the 30-foot strip was, at the time the taxes in question were assessed, a part of a public street. The street was exempt from taxation, and therefore the tax judgment and proceedings thereunder were void. G. S. 1894, § 1582.

5. Appellant contends that it does not sufficiently appear that the intervenors are taxpayers, and therefore they have not shown that they are entitled to the relief which the court below granted them. It appears that at the time this action was commenced, and for several years prior thereto, they were the owners of the lots aforesaid. The court finds that they were such owners at the time of the trial, and it is presumed, until the contrary appears, that they still continue to be such owners. Then it sufficiently appears that they are taxpayers.

6. Appellant contends that the court below erred in permitting the intervenors, after the case had been submitted and decided, to change the theory on which they had proceeded on the trial, and in disposing of the case on an issue which plaintiff had no opportunity to meet or combat on the trial. In answer to this, it is only necessary to say that all of the facts in the case support the new order for judgment, and all of these facts which are material

were admitted by plaintiff on the trial, and she suggests no new facts which she could prove on another trial which would, by way of confession and avoidance, take any of the force out of her admissions. She claims now that there is evidence in the record tending to prove that the 30-foot strip in question is not in the street as laid out and traveled, but is at one side of the same.

It appears by the settled case that, on the trial, plaintiff repeatedly and expressly admitted that the 30-foot strip is in the street. On the former appeal, plaintiff conceded that the lots of the intervenors abutted on this 30-foot strip which was a part of the street. Plaintiff contended that the intervenors were not estopped by the Hansen judgment, but that the city was; that, therefore, as to the intervenors, the strip is still a part of the street; that, as to them, the strip was a part of the street before the condemnation proceedings, and is yet a part of the street; that, therefore, the city took nothing from the intervenors by the condemnation proceedings; and it follows that the intervenors are not entitled to any part of the award. We agreed with plaintiff in all of these propositions, but we drew from these very same facts one more conclusion, to which plaintiff objects. In our opinion, the court below did not abuse its discretion in changing the order for judgment.

7. The 30-foot strip in question abuts also on lot 6, adjoining Sache's lot on the south. Neither of the intervenors claims any interest in lot 6, and appellant contends that therefore she is entitled at least to the damages for the part of the 30-foot strip in front of this lot. We are of the opinion that Sache would be specially and peculiarly injured by vacating one-half the street abutting on the lot next to hers; that she would thereby suffer an injury peculiar to herself (besides what she would suffer in common with the general public), sufficient to entitle her to maintain an action in her own name in regard to the matter. Then she is not estopped by the Hansen judgment as to this part of the 30-foot strip, and, if she is not so estopped, she has as much right as a general taxpayer to prevent the taking of funds out of the city treasury to pay for this part of the strip, as any other part of it.

8. On the motion of the intervenors to amend the conclusions of law and order for judgment, appellant read counter affidavits

showing that, since the trial of this action, the greater portion of the special assessments levied to pay the damages awarded in the condemnation of said 30-foot strip have been collected, and that tax judgments have been entered for nearly all of the balance of these assessments; that such a tax judgment has been entered against the lots of the trust company, but not against the lots of Sache, she having succeeded in defending against the application for judgment. It is also shown that in a former action brought by the trust company against the city and this plaintiff, in which the same relief was sought as has been granted to the trust company herein, judgment was entered on the merits against the trust company. The motion for a new trial is not made on the ground of newly-discovered evidence, or on the ground of facts occurring since the former trial. But conceding that all of these facts are here material, and conceding that if a new trial was granted, and these matters were set up by plaintiff in a supplemental pleading, they would enable plaintiff on another trial to prevail as against the trust company, still plaintiff could not by reason of these matters prevail as against Sache, and the result would be the same, except that the plaintiff might recover her costs against the trust company. For these reasons, if for no other reason, the court was justified in granting the motion to amend its conclusion of law and order for judgment.

This disposes of the case, and the order appealed from is affirmed.

STATE OF MINNESOTA v. SABINA J. COOLEY and Others.

June 8, 1898.

Nos. 10,956—(14).

Grand Jury—Member Disqualified but not Acting—Indictment Legal.

Where a grand jury is composed of not less than 16 members and not more than 23, its action is not vitiated by reason of there being drawn as one member thereof a disqualified person, he being excused before the charge in the indictment is considered. The remaining jurors—not less than 16 being present when the matter before them is under con-

sideration—may legally find an indictment, 12 of their number concurring therein.

Same—Member Irregularly on Panel but not Disqualified.

The general rule is that mere irregularity in the proceedings by which a grand juror gets upon the panel does not affect the legality of its proceedings if such grand juror is not personally disqualified.

Same—Number of Jurors.

Where the number of grand jurors is less than 23, but not less than 16, the defendant cannot complain, because the smaller the number the more secure is the defendant against being indicted.

Sabina J. Cooley, George C. Cooley and Julius Leopold were indicted for the crime of unlawfully selling intoxicating liquor. Upon their arraignment before the district court for Jackson county, they moved to set aside the indictment because it “was not found, indorsed and presented as prescribed in the chapter relating to grand juries” in the details specified in the opinion. The motion was overruled, Quinn, J., and the case certified to this court. Affirmed.

E. T. Smith, County Attorney, for the State.

George W. Wilson and *W. B. Sketch*, for defendants.

BUCK, J.

Case certified by the district court of Jackson county to this court upon the request of all of the defendants after the court had overruled a motion on their part to set aside an indictment wherein they were charged with the crime of having unlawfully sold intoxicating liquor at the village of Heron Lake, in said county.

The facts, briefly stated, are that a grand jury was duly drawn and appeared on the first day of the term of the district court in said county held in October, 1897, when it appeared to the court that five of said persons so appearing were not citizens of the United States or of this state, and they were then excused by the court, and it ordered a special venire for five persons to supply the deficiency. Five persons were accordingly summoned, and they, with the other 18 persons already summoned, were sworn as the grand jury, and after they had been in session 48 hours it appeared that one of their number, viz. P. C. Nelson, was not a citizen of the United States or of this state, and he was then excused by the

court, and no juror summoned to supply the deficiency. Thereafter the charge in the indictment was considered by the remaining 22 jurymen, and the indictment found and returned by them as the grand jury.

One of the 22 grand jurymen who found the indictment was August Lindstrum, he being present with said grand jury when the charge contained in said indictment was under consideration, and he took part in finding the same. Lindstrum's name had been placed on the previous annual list of grand jurors in January, 1896, by the county commissioners of Jackson county, and thereafter he was duly drawn and served as a grand juror at the May, 1896, term of said court. There was no legal annual list of grand jurors made in January, 1897, and in July, 1897, his name was again placed upon the annual list of grand jurors for said year, and he was drawn as a grand juror for the October term of said court, at which time he acted as a grand juror as above stated. Jackson county then contained a population exceeding ten thousand people.

Upon the foregoing facts the defendants moved to set aside the indictment, which motion was denied, and case certified according to law. Defendants claim that when Nelson was excused it created a deficiency, and that the panel should have been filled to the full number of 23.

G. S. 1894, § 7170, defines what constitutes a grand jury, viz.:

"A grand jury is a body of men, not less than sixteen nor more than twenty-three in number, returned at stated periods from the citizens of the county, before a court of competent jurisdiction, chosen by lot, and sworn to inquire of public offenses committed or triable in the county."

This grand jury appears to have been formed in the respect to numbers, as prescribed by statute, viz, not less than 16 nor more than 23. Proffatt on Jury Trial (section 46) lays down the rule that, if the necessary minimum number are on the grand jury when an indictment is found, it will be good. Of course under G. S. 1894, § 7187, no more than 23 nor less than 16 persons can be sworn on a grand jury, and it cannot proceed to business with less than 16 members present. By section 7232 of said statutes it is provided that no indictment can be found without the concurrence of at

least 12 grand jurors, and when so found it shall be indorsed, "A true bill," and the indorsement be signed by the foreman of the grand jury, whether he is one of the 12 so concurring or not. There is no pretense but that this indictment was found with the concurrence of at least 12 grand jurors, and when there were present a number of grand jurors not less than the minimum nor more than the maximum fixed by law. "The parties cannot insist upon the attendance of the full panel directed to be summoned." Thompson & M. Jur. 75. In the case of *Dolan v. People*, 64 N. Y. 485, 493, it was said that the

"Precise number is fixed by the statute for no purpose of benefit or advantage to the persons who may be presented for indictment. The sole object of requiring this number is to secure the attendance at court of a sufficient number to constitute a grand jury."

Excusing Nelson still left six more grand jurymen than the minimum number required by law to be present when the charge was acted upon by them. This court held, in *State v. Froiseth*, 16 Minn. 277 (313), that, if not less than 16 persons appear and are impaneled, sworn, and charged by a court, a competent jury is organized. In *State v. Causey*, 43 La. An. 897, 9 South. 900, it was held that

"The drawing and placing of a disqualified person on a grand jury as a member thereof, and the subsequent removal of such person from it by the court, after impanelment, on objection, for proper disqualification, do not so vitiate or infect that body as to paralyze it, and blot it out of existence";

And we fail to understand how the defendant's rights could in any manner be jeopardized, or in any manner injured, by not summoning another grand juror in the place of Nelson. Their counsel say that Nelson's being excused created a deficiency, and that the panel should have been filled as provided by G. S. 1894, § 7185. If counsel mean to be understood as claiming that, the greater the number of grand jurors, the less likely were the defendants to be indicted by 12 members, their contention is unsound. The reverse is exactly the case. It seems reasonable to suppose that the smaller the number of members, the less likely to find 12 members who would be

liable to find an indictment. In Bishop's New Criminal Procedure (volume 1, § 855) he says:

"The smaller the number whereof the twelve are a part, the more secure is the defendant against being indicted. The provision is in his favor. On the other hand, if it authorizes more than twenty-three grand jurors, and a finding on a vote of twelve, it increases his danger, and, in principle, it is unconstitutional."

Bishop was writing of the constitutional and legislative restrictions in fixing the number of grand jurors. To make this proposition plainer, suppose the maximum number of grand jurors was 100 and the minimum number 16, and the concurrence of 12 members was required to find an indictment, would it not be self-evident that there was more danger of the defendants being indicted by the concurrence of 12 of the members than if there were only 16 members present and acting? It needs but little reflection and an analysis of this matter to see that the defendants are complaining of a proceeding which was really for their own benefit, instead of being an injury to them. Possibly, if the deficiency of five members in the first instance had not been filled, the defendants would not have been indicted. Whatever the number of the organized grand jury, 12 persons by the unwritten law, and largely by statute, are an adequate quorum for business. 1 Bishop, New Cr. Proc. § 854, subs. 2. Hence, where the grand jury is composed of not less than 16 members and not more than 23, its action is not vitiated by reason of there being drawn as one member thereof a disqualified juror, he being excused before the charge in the indictment is considered; and the remaining grand jurors, not less than 16, being present when the matter before them is under consideration, may legally find an indictment.

Many causes might arise, such as death, sickness, compulsory absence, or personal disqualification of one or more jurors, whereby the number would necessarily be reduced below the maximum number, but there still remain the minimum number of 16 or more, when it would be desirable and beneficial to the public interests to have the grand jury business proceed without delay or additional expense by attempting to fill the deficiency. While we are not unmindful of the duty which courts owe to those charged with public offenses

to see that all proper safeguards are placed around them in criminal proceedings, yet courts do not look with indulgence upon an objection of the kind here raised, where there is no fraud or design which could result to the defendants' injury.

Lord Hale once said that the great strictness in favor of life required in points of indictments

"Is grown to be a blemish and inconvenience in the law and the administration thereof; more offenders escape by the overeasy ear given to exceptions in indictments than by their own innocence, and many times gross murders" "escape by these unseemly niceties to the reproach of the law." 2 Pleas of the Crown, c. 25.

This brings us to the objection raised by defendants, that a person, viz. August Lindstrum, was permitted to be present during the session of the grand jury while the charge embraced in the indictment was under consideration, who took part in the finding of said indictment; he being a person other than a legally qualified grand juror.

The first thing to be noted in this respect is that no personal disqualification attached to him. We need not here recite what constitutes personal disqualification, because the question is not raised. In all respects he was a legal and qualified grand juror unless placing his name on the list in July, 1897, after his name had been on the previous annual list in 1896, made him otherwise. There is a distinction between a juror who is personally disqualified and one who possesses all the requisite qualifications, but is irregularly and improperly drawn. The general rule is that mere irregularity in the proceedings by which a juror gets upon the panel does not affect the validity of his action. *Com. v. Brown*, 147 Mass. 585, 18 N. E. 587. In the same case it is said that nearly all the cases where verdicts or indictments have been set aside rest upon an absolute disqualification of a juror. G. S. 1894, § 673, in part reads as follows:

"In all counties where the population shall exceed ten thousand people, no person shall be included in such list who was included in the last previous annual list, and any person having served as a juror for one term of court shall be retired from such list, and shall not be again drawn during the same year."

The law does not personally disqualify him from serving as a

juror. The county commissioners are forbidden to include him in the list where he was included in the last previous annual list, and where he has served as a juror one term of court he is to be retired from the list, and not drawn again during the same year. There is not a word or sentence by which the proceedings make him personally unfit or disqualify him as a grand juror. During all this time that the officers are forbidden to include him in the list or draw him as a juror his personal qualifications as a juror stand unchallenged. When this limitation as to time is removed, he stands, as previously, a personally qualified grand juror. The fact that the prohibition against his further serving as a juror until after the expiration of the conditions to which we have referred seems to proceed upon the theory that he is properly a personally qualified jurymen, but that as such he cannot be drawn until after the expiration of a certain period. The statute fixing the personal qualifications of a grand juror is in no way interfered with.

"A qualified and competent grand juror, if irregularly drawn, may with his fellows find an indictment to which the defendant cannot object; for he has no interest in the manner of the drawing." 1 Bishop, New Cr. Proc. § 875.

In the case of *U. S. v. Ambrose*, 3 Fed. 283, Swayne, C. J., at page 286, used this language:

"The point that gave me most trouble in my examination of the case, and caused me to hesitate for two or three days, was the fact that one of the grand jurors named in the venire was not put into the box by any competent authority, and not drawn from it. But his name was in the venire, and there is no imputation that it was put there in bad faith. There is no light thrown upon the subject as to how, or why, or wherefore, or under what circumstances it was put there. His name was regularly in the venire, and the marshal had no choice but to serve him, and it is not contended that he had not the qualifications required by law. He assisted in finding the indictment, and it is before the court. Now I think that this fact comes within the category of mere irregularities, which will not be permitted to vitiate the entire action of the grand jury, and I therefore say that, so far as that point is concerned, I feel warranted in overruling it."

In the case at bar Lindstrum was listed, drawn, sworn, impaneled, and charged by the court, having power generally to perform

the duties, and he assumed to act in good faith as a competent grand juror, without any charge of evil design being at any time made against him, not even in these proceedings. A mere irregularity in placing a qualified person on the grand jury, as by drawing the name of a person generally qualified, but who had been stricken from the jury list by a vote of the town, is not fatal to the legality of the panel. *Com. v. Brown*, 147 Mass. 585, 18 N. E. 587. We are of the opinion that the proceedings by which Lindstrum was placed upon the grand jury were irregular, but do not render his act in taking part in finding this indictment invalid. *State v. Russell*, 69 Minn. 502, 72 N. W. 832.

Order affirmed. The case is remanded for further proceedings therein.

DICKINSON COMPANY v. ELIAS FITTERLING.

June 8, 1898.

Nos. 11,077—(168).

Lease—What Constitutes—Contract Construed as a Lease.

An agreement attached to the complaint herein construed as constituting a lease, and not merely an agreement for a lease.

Same—Covenant to Pay Rent—Assumption by Third Person—Action by Landlord.

Held, also, that by the agreement between D. & C. with D. Co., by the terms of which the latter assumed and agreed to perform all the covenants of a lease, including the payment of rent to the end of the term, running from D. & C. to F., to whom the rent was due and payable, F. could maintain an action on the covenant in his own name, and for his own benefit.

Appeal by Victor J. Welch, assignee of The Dickinson Company, insolvent, from an order of the district court for Hennepin county, Simpson, J., denying a motion for a new trial and refusing to set aside a decision of the court, Russell, J., allowing the claim of Elias Fitterling against the estate of the insolvent for \$5,672.98 and interest. Affirmed.

Marcus P. Hayne and *Frank R. Hubachek*, for appellant.

B. W. Smith and *C. H. Rossman*, for respondent.

BUCK, J.

On the former appeal in this case, we held that the agreement attached to the complaint herein, made between Fitterling, one party, and Dickinson & Cunningham, the other party, constituted a lease, and not merely an agreement for a lease. The case is reported in 69 Minn. 162, 71 N. W. 1030. We have now before us the agreement between Dickinson & Cunningham and the Dickinson Company, by the terms of which the latter assumed and agreed to perform all the covenants of the lease, including the payment of rent to the end of the term. Under the reported decisions of this court, Fitterling, to whom the rent was due and payable, could maintain an action on this covenant in his own name and for his own benefit. This is decisive of the case, without considering the question whether the Dickinson Company was assignee of the lease or an undertenant. There is nothing in the point that the assignment to the Dickinson Company was void, because not assented to by the lessor. This condition was for the exclusive benefit of the lessor, and he could waive it.

Order affirmed.

AMERICAN BAPTIST MISSIONARY UNION v. A. W. HASTINGS and Others.

June 9, 1898.

Nos. 10,973—(1011, 12*).

Mortgage—Covenant to Pay Taxes—Conveyance Subject to Mortgage—Second Mortgage to Mortgagor—Tax Certificate Bought by Assignee of Second Mortgage in Possession.

B. executed to plaintiff a mortgage, in which he covenanted to pay all taxes on the mortgaged premises. He then conveyed the premises to D., subject to the mortgage, which the grantee assumed and agreed to pay. D. executed a mortgage back to B., who assigned it to defendant W. The latter went into possession as mortgagee in 1890, and continued in possession as such until July, 1892, after which he continued in possession as owner, under title acquired by foreclosure of his mort-

¹ April, 1898, term.

² October, 1898, term.

72	484
74	351

gage, until December, 1895, when he surrendered possession to plaintiff, which had become owner under a foreclosure of its own mortgage. While in possession as mortgagee in 1891, defendant W. took a state assignment certificate under a sale of the mortgaged premises for the taxes of 1889. While in possession as owner, he failed to pay the taxes for the years 1893 and 1894, which plaintiff was compelled to pay after it acquired title under its foreclosure, and which amounted to more than the defendant had paid for the assignment certificate for taxes of 1889. *Held*, that defendant W. had no equitable right, as against plaintiff, to hold the tax assignment certificate as security to reimburse himself for the amount paid for the same.

On Reargument.

November 14, 1898.

Same—No Duty of Second Mortgagee to Pay Taxes—He May Hold Tax Title as Security for Reimbursement by First Mortgagee.

Held, reversing the former decision, that defendant W. occupied the position of a second mortgagee, and as such owed the first mortgagee no duty to pay the taxes on the mortgaged premises; that while his purchase, after he went into possession as mortgagee, of the outstanding tax title for taxes of 1889, will be treated as only a payment of the tax for the protection of both mortgages, yet, if the first mortgagee avails himself of this protection, he must reimburse him for what he paid for the tax title; and the second mortgagee may hold such title as security for his reimbursement, it appearing that he had expended more than the amount of the rents and profits received by him in payment of interest on the first mortgage, and for improvements and repairs necessary for the protection and preservation of the mortgaged premises.

Same—Failure to Pay Subsequent Taxes—Equity.

Also, that his equitable right to hold this tax title as security for his reimbursement was not extinguished by his failure to pay the taxes on the premises which accrued after he became owner (subject to the first mortgage), it appearing that he had expended for the protection and preservation of the premises more than all the rents and profits received by him up to the time he surrendered possession to the plaintiff as purchaser at a foreclosure sale of its own mortgage, including interest paid on the first mortgage (which he was under no obligation to pay), far in excess of the amount of such taxes.

Action in the district court for Hennepin county against A. W. Hastings, as treasurer, C. R. Cooley, as auditor, of said county, and C. W. Weeks to recover the sum of \$790.03 paid by plaintiff to de-

defendant Hastings to redeem from a tax sale. The case was tried before McGee, J., who found in favor of plaintiff. Judgment was entered that plaintiff recover of defendant Hastings, as treasurer, the sum demanded, that defendant Weeks had no right thereto, and that defendant Cooley, as auditor, be enjoined from issuing to defendant Weeks a warrant for the payment of said sum. From this judgment defendant Weeks appealed. Reversed upon reargument.

Geo. D. Emery, for appellant.

If plaintiff would avail itself of the protection afforded by defendant's purchase of the tax title, equity requires that it should reimburse defendant for the amount paid. *American Baptist M. U. v. Hastings*, 67 Minn. 303; *Pratt v. Pratt*, 96 Ill. 184; *Hogg v. Longstreth*, 97 Pa. St. 255; *Silver Lake v. North*, 4 Johns. Ch. 370; *Roeder v. Keller*, 135 Ind. 692; *Connecticut v. Stinson*, 62 Ill. App. 319; *Connecticut v. Bulte*, 45 Mich. 113; *Garrettson v. Scofield*, 44 Iowa, 35. If the senior mortgagee wants the benefit of the protection thus afforded, he must tender the amount of the tax and interest. *Fiacre v. Chapman*, 32 N. J. Eq. 463; *Ten Eyck v. Craig*, 2 Hun, 452; *McLaughlin v. Green*, 48 Miss. 175, 209; *Abbott v. Union*, 127 Ind. 70; *Bowman v. Cockrill*, 6 Kan. 311, 332; *Stubblefield v. Borders*, 92 Ill. 279. A junior mortgagee, in an accounting for rents collected by him, is allowed necessary improvements, which go to increase the value of the estate, as well as necessary repairs. He is not held strictly to prove the necessity of such improvements. *Seaver v. Cobb*, 98 Ill. 200; *Wells v. Van Dyke*, 109 Pa. St. 330; 2 Jones, Mort. §§ 1129-1134; *Hubbell v. Moulson*, 53 N. Y. 225; *Sidenberg v. Ely*, 90 N. Y. 257. If plaintiff is to have the benefit of the payment, it must do equity. *Moore v. Wayman*, 107 Ill. 192; *Williams v. Townsend*, 31 N. Y. 411.

Russell, Cray & Jamison, for respondent.

Defendant could not acquire title to the lands, or lawfully claim the money required to redeem from a tax claim held by him which he and his predecessors and grantors should have paid. *Washington L. & T. Co. v. McKenzie*, 64 Minn. 273; *American Baptist M. U. v. Hastings*, 67 Minn. 303. It was the duty of those taking under the mortgage to pay the taxes. This is not a case for an account-

ing for equities between the first mortgagee and the second mortgagee and the subsequent owner thereunder. Defendant was interested as mortgagee in possession on May 26, 1891, when he took an assignment of the certificate of tax sale, and is not in a position to claim a lien for the amount so paid. *Washington L. & T. Co. v. McKenzie*, *supra*.

MITCHELL, J.

This case was here on a former appeal. 67 Minn. 303, 69 N. W. 1078. Stated according to their legal effect, the facts found on the subsequent trial on the merits were as follows:

In June, 1889, one Barber mortgaged certain premises to plaintiff, covenanting to pay all taxes. Shortly afterwards Barber conveyed the premises to one Munger, subject to the mortgage, which the grantee assumed and agreed to pay. A few days later Munger conveyed to one Duffus, subject to the mortgage, which the grantee assumed and agreed to pay. Shortly afterwards Duffus executed a mortgage to Barber, plaintiff's mortgagor. Barber assigned this mortgage to the defendant Weeks. March 27, 1890, Weeks went into possession as mortgagee. May 26, 1891, Weeks took from the state an assignment certificate for the taxes of 1889, the amount paid therefor being \$492.77. July, 1891, Weeks foreclosed his mortgage by action, bid in the property for the amount of principal and interest due thereon, and the sale was confirmed. July, 1892, the redemption on Weeks' foreclosure having expired, and there having been no redemption, he became owner in fee, subject to plaintiff's mortgage. December 17, 1894, plaintiff foreclosed, and bid in the property for the amount of the principal and interest due on its mortgage. December 17, 1895, there having been no redemption from plaintiff's foreclosure, it became owner of the premises, and Weeks surrendered the possession to it.

Weeks, while in possession, did not pay the taxes for 1893 and 1894, amounting to \$789.81, which plaintiff was compelled to pay after it acquired absolute title under its foreclosure. It will be noted that these taxes accrued, not while Weeks was in possession as mere mortgagee, but while he was in possession as owner from July, 1892, to December, 1895. In February, 1896, plaintiff, under protest, redeemed from the sale for taxes of 1889 (for which Weeks

had an assignment certificate), and then brought this action to recover the money. Weeks claims the right to it to reimburse himself for what he paid to the state for the certificate. What Weeks paid out, while in possession as mortgagee and as owner, for repairs, improvements, and taxes for 1890, 1891, and 1892 on the premises, amounted to as much or more than all that he received for rents and profits during the same period.

1. Conceding, without deciding, that if Weeks' mortgage had been executed by Barber, he would have had an equitable right as against plaintiff to hold the assignment certificate for the taxes of 1889 as security for what he had paid out; and conceding, without deciding, that this right would not have been affected by his going into possession as mortgagee, except to the extent that he would be compelled to account for the rents and profits,—still there are conclusive reasons why he has no such right under the facts of this case. The mortgage under which he claims was executed, not by, but to, Barber, who was plaintiff's mortgagor, and who had expressly covenanted in the mortgage to pay all taxes on the premises. In the face of his own covenant, Barber would not be allowed to hold the assignment certificate, even as security for what he had paid for it; and Barber could not, by assigning the mortgage, give his assignee any greater rights than he himself had. Weeks stands exactly in the shoes of his assignor, Barber.

2. After the redemption period on Weeks' foreclosure expired in July, 1892, he became absolute owner of the premises, and held precisely the same title and bore the same relation to them and to the parties interested in them as if he had taken an absolute deed immediately from Barber. While he may not have been personally liable to plaintiff to pay the current taxes on the premises, yet as owner in possession he equitably owed the duty to do so both to the state and to the plaintiff. During two of the years while he was thus in possession as owner he failed to pay the current taxes, which plaintiff was afterwards compelled to pay, amounting to more than Weeks had previously paid for the taxes of 1889. Therefore assuming, without deciding, that he had originally an equitable right to be reimbursed for the taxes of 1889, this equity was destroyed by his subsequent failure to pay the current taxes for

1893 and 1894. If there appears to be anything inequitable in the result to which this leads, it is but the consequence of the peculiar relation to the title which Weeks voluntarily assumed. Plaintiff is still out of pocket by reason of the default of Barber and those claiming under him.

While all of the foregoing facts may have appeared in the record on the former appeal, yet neither of the grounds upon which we now base our decision was specifically urged by counsel, nor was either brought to the attention of the court or passed upon by it. Neither was there anything decided on the former appeal, so as to become the law of the case, inconsistent with the views now expressed. The first part of the former opinion merely decided that Weeks' relationship to the property and the parties was such that he could not acquire a tax title as against the plaintiff. The second part, as we construe it, merely held that, assuming, without deciding, that Weeks might have the right to hold the tax assignment certificate as security for what he had paid out, the burden was on him first to account for the rents and profits while he was in possession of the premises.

Judgment affirmed.

START, C. J. (dissenting).

I dissent. I agree with the conclusion of the court that the decision on the former appeal does not affect the question presented by this appeal. The relation of Weeks to the property was such that he could not acquire and hold a tax title against the plaintiff. But he was not bound to perform the personal covenant of Barber to pay the taxes. If he had paid the taxes of 1889, instead of taking an assignment certificate therefor, he would have had the right to reimburse himself out of the first money received from the rents and profits of the property; and if he had paid all that he thereafter received from such source for taxes and repairs, the plaintiff would have had no further claim upon him, although he failed to pay all of the taxes accruing during the time he was in possession.

When he took the assignment certificate, he then had the unquestioned right to hold the certificate as security for his reimbursement. Now, when and how has he forfeited this right? This court

says that it was when and because he failed to pay all of the current taxes while he was in possession. But he disbursed every dollar he received for the protection of the property. Will equity enforce a forfeiture because he did not do more? The legal title to the money in question is in him. The plaintiff has not shown a superior equity to it, and his equity must prevail.

BUCK, J. (dissenting).

I also dissent. From the facts found in the record it appears that Weeks had paid out as former mortgagee, on the interest on the prior mortgage, taxes, repairs and other expenditures the sum of \$808.78, more than all his receipts and profits from the premises. The taxes for 1889 were levied upon said premises subsequently to the time when the Barber mortgage was executed to plaintiff, and consequently such payment was beneficial to the plaintiff as mortgagee. This is true also of the interest and taxes paid by Weeks as well as the necessary repairs and improvements made by him on the premises. While these payments operated for the protection of Weeks himself, especially the purchase of the tax title assessed for 1889 and due while he was in possession, which he was compelled to pay for his own protection, equity requires that, if the prior mortgagee would avail itself of the protection thus afforded, it should not be permitted to regain possession of the redemption money so paid by it to the county treasurer, but that it should belong to Weeks by way of reimbursement for the taxes paid by him for the taxes levied for 1889. This, we think, is in line with the law as stated in the opinion on the former appeal. 67 Minn. 303, 69 N. W. 1078.

The facts herein, however, are different in some respects from what they there appeared. It did not there, as here, appear that defendant's lawful expenditures were more than \$800 in excess of the rents and profits. Now, while a second mortgagee is under no obligation to protect the lien of the first mortgagee by payment of taxes or by purchasing the premises for his benefit at a tax sale, yet, if he does pay or purchase, the act ipso facto constitutes a protection. *Connecticut v. Bulte*, 45 Mich. 113, 7 N. W. 707. And, if the senior mortgagee wants the benefit of the protection thus afforded,

he must tender the amount of tax so paid. *Fiacre v. Chapman*, 32 N. J. Eq. 463. There is good reason for this rule. The tax lien in this case was paramount to the lien of the first mortgage, and, if such lien had not been removed by payment of the tax judgment, a title by a sale of the premises thereunder might have ripened into title superior to the lien of the plaintiff's mortgage, and cut off all its rights. That such payment protected the defendant as well as the plaintiff did not deprive the defendant of this right of equitable subrogation. The payment was in no sense voluntary. *American Baptist M. U. v. Hastings*, 67 Minn. 303, 69 N. W. 1078.

The defendants Hastings and Cooley, as officers of Hennepin county, have no interest in this action. The treasurer, Hastings, is merely holding the funds for the benefit of the party entitled thereto. And here it may be noted that plaintiff does not stand in the position of a redemptioner from the defendant's mortgage foreclosure of the second mortgage.

A senior mortgagee is not entitled to redeem from a foreclosure sale made by a junior mortgagee, although he may do so from a tax lien on the premises, and this, too, where it is held by the junior mortgagee. But this is done, not for the benefit of the junior, but the senior, mortgagee. In this case the action is merely to recover the taxes which the senior mortgagee paid for its own protection, and which defendant Weeks paid for the protection of both. That the payment by defendant Weeks was beneficial to plaintiff, there can be no reasonable doubt. Though Weeks was under no legal obligation to pay the taxes, yet he had the right to do so, and, if such payment inured to plaintiff's benefit, as senior mortgagee, why should such payment not be allowed to stand as against itself? The burden of showing that defendant Weeks had received more rents and profits while in possession of the premises than were sufficient to pay the taxes of 1897, and the other lawful expenditures connected with the use and management of said premises, rested with plaintiff, and this, I think, it failed to do. Certainly, the fund sued for was a legitimate expenditure for unpaid taxes for that year, and, as such payment operated for the benefit and protection of plaintiff, it ought not to maintain this action for its recovery. I think the judgment should be reversed.

An application for a reargument having been granted, the case was submitted upon briefs at the October, 1898, term.

Geo. D. Emery, for appellant.

Defendant Weeks does not stand in the shoes of his assignor. He was not prevented by any covenants or by law from buying in an outstanding prior lien and thus strengthening his title. *Gjerness v. Mathews*, 27 Minn. 320; *McLaughlin v. Acom*, 58 Kan. 514. The prior lien-holder ought to pay for the protection afforded; and, if he wishes immunity from the effect of the tax certificate, he must reimburse the junior lien-holder for the money thus invested. *Maxfield v. Willey*, 46 Mich. 252, and cases *supra*. The right to acquire a tax title depends on the absence of any duty in regard to the tax. *McLaughlin v. Acom*, *supra*; *Swan v. Emerson*, 129 Mass. 289. Weeks was under no obligation to pay the tax. He had never covenanted to pay, and the duty was not enjoined on him as owner. 2 Jones, Mort. § 1134. *Prima facie* Weeks is the legal owner of the certificates, and entitled to the money paid for their redemption. Plaintiff shows no superior equity. He is subrogated to the prior lien of the state. All the cases distinguish between the duty of the mortgagee in possession as to taxes assessed during such possession and as to those assessed prior thereto. These certificates were assessed before Weeks' mortgage was made, and as to it he owed no duty to any one, not even to the state. 1 Jones, Mort. § 713; 25 Am. & Eng. Enc. 269, 270; *Ebert v. Gerding*, 116 Ill. 216. The court overlooked the fact that up to July, 1892, Weeks was simply a creditor charged with no duty towards the first mortgagee, except to submit so much of the title as he acquired from Duffus to the lien of plaintiff's mortgage. *Wilson v. Jamison*, 36 Minn. 59; *Allison v. Armstrong*, 28 Minn. 276. During several years he was in possession in the name of Shattuck, but, as plaintiff alleges, for his own benefit. His possession was notice of his rights, and hence plaintiff bought subject to these certificates, and must have bought with the intention of paying them off. *American B. & L. Assn. v. Waleen*, 52 Minn. 23; *American B. & L. Assn. v. Stoneman*, 53 Minn. 212; *Pioneer S. & L. Co. v. Freeburg*, 59 Minn. 230.

Russell, Cray & Jamison, for respondent.

On November 14, 1898, the following opinion was filed:

MITCHELL, J.

A re-examination of this case upon reargument has satisfied us that the reasoning of the former opinion is fallacious.

The first proposition laid down in that opinion is that Weeks stands in the shoes of Barber; that as the latter would not, in the face of his covenant to plaintiff, be permitted either to acquire a tax title, so as to cut out plaintiff's mortgage, or to hold it as security for what he had paid for it, therefore he could not, by assigning the mortgage, give Weeks any greater rights than he himself had. But Barber's duty to plaintiff to protect the land against taxes arose, not by reason of the second mortgage, but by reason of his covenant in the first mortgage, to which Weeks was in no way a party; and when Barber assigned the second mortgage he neither changed his own duties to the plaintiff, nor devolved them upon Weeks. Weeks stood in exactly the same position as if the second mortgage had been executed directly to him either by Barber or by Barber's grantee, Duffus. As such second mortgagee, he owed no duty to the first mortgagee to pay the taxes of 1889. There being no such duty, some cases, for that reason, hold that a second mortgagee may, by purchase at a tax sale, cut off the lien of the first mortgage. Other cases hold, what may be the more just and politic doctrine, that in such case, as in the case of tenants in common, the purchase is only a payment of the tax, which will inure to the protection of both mortgages. But in equity the first mortgagee, if he claims the benefit of this protection, must reimburse the second mortgagee for what he has paid for taxes. This is reasonable and equitable, for taxes constitute a lien paramount to both mortgages, and, if not discharged, will extinguish both. A second mortgagee, as such, owes no duty to the first mortgagee to pay taxes on the mortgaged premises. *Connecticut v. Bulte*, 45 Mich. 113, 7 N. W. 707; *Fiacre v. Chapman*, 32 N. J. Eq. 463.

We have not overlooked the fact that when Weeks purchased the state assignment certificate he occupied the position of a mortgagee in possession; nor have we forgotten the doctrine, frequently laid down by the authorities without limitation or qualification, that a mortgagee in possession occupies the same position as the mort-

gagor. This is true for certain purposes, but not for all. It certainly would not be held that a second mortgagee, who had received possession of the mortgaged premises merely as additional security for the payment of his debt, thereby assumed the obligation of the mortgagor to pay the first mortgage. He would undoubtedly have to account for the rents and profits, and would be bound to use them, so far as necessary, for the preservation and protection of the premises including the payment of taxes.

It may be also conceded, without deciding, that he would owe the first mortgagee the duty of paying current taxes that accrue while thus in possession. But in this case the tax of 1889 had become due, and the premises sold therefor to the state, before Weeks went into possession. It appears that he has paid out for interest on plaintiff's mortgage, and for improvements, repairs and taxes (other than those for 1889), on the premises, some \$800 in excess of all the rents and profits received by him from the time he went into possession in 1892, down to the time he surrendered possession to the plaintiff in 1895. According to the findings, all these expenditures were reasonably necessary for the preservation and protection of the property. Thus far we see nothing affecting Weeks' equity to hold the tax title as security for what he paid for it.

The second proposition advanced in the former opinion is that, even if Weeks was originally equitably entitled to hold the tax title as security for what he had paid for it, he had lost that equity by reason of his failure to pay the taxes for 1893 and 1894, which accrued after he became owner in fee of the premises (subject to plaintiff's mortgage), and while he was in possession as such owner. If this was all of the case, the conclusion reached would seem reasonable and equitable. But this is only a partial view of the case. The remaining facts are that Weeks had already necessarily expended and paid out for the benefit of the plaintiff, or the protection and preservation of the premises, \$800 more than all he had received; and of the amount thus paid out by him over \$4,500 was interest on plaintiff's mortgage, which was paid directly to it, and which he was under no legal obligation to pay. He could have retained enough of that money to pay the taxes of 1893 and 1894, but, instead of that, he paid it to the plaintiff, who in turn paid it

to the state. We fail to see how the fact that he adopted the latter course instead of the former should deprive him of the equity, which he previously possessed, to recover the amount of his prior investment in the tax-assignment certificates. The legal title to the fund in controversy is in Weeks, and he is entitled to it unless the plaintiff shows a prior and better equity. The facts do not establish any such equity. Suggestions are made of some sinister motive on the part of Weeks in pursuing the course which he did, but there is nothing in the findings (which are all we have before us) justifying any such charge.

The order of affirmance in the former opinion is vacated, the judgment reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the defendant upon the findings of fact, unless the court shall, for cause shown, grant a new trial. It is so ordered.

CANTY, J. (dissenting).

I agree with the majority that the former opinion is fallacious, but it seems to me that their present opinion is equally so. It seems to me that the second mortgagee in possession stands in the same position as the mortgagor's grantee in possession. Such mortgagee derives the possession from the mortgagor, and enjoys all the fruits of that possession. He cannot acquire a tax title, even as against the mortgagor. *Brown v. Simons*, 44 N. H. 475; *Black*, Tax Tit. § 278. Of course, between the owner and such mortgagee, an accounting must be had, and the amount of the taxes paid by the latter must be allowed in the account. But I am of the opinion that, as between the first mortgagee and the second mortgagee in possession, the latter is not entitled to reimbursement for taxes paid by him, any more than such a grantee in possession would be. The decision of the majority will open the door for invasion of the public policy which requires such a grantee to pay the taxes, and disables him from acquiring a tax title. In my opinion, the order appealed from should be affirmed.

W. W. SHELDON v. L. J. BROWN and Another.

June 9, 1898.

Nos. 11,000—(121).

Two Chattel Mortgages—Execution upon Same Day—Presumption.

Where two chattel mortgages were executed on the same day, and there is no evidence that one was executed at an earlier hour than the other, they will be presumed to have been executed contemporaneously.

Same—Co-ordinate Liens—Tenancy in Common—Filing.

When two chattel mortgages are executed contemporaneously, and there was no agreement between the parties that one should have priority over the other, the liens are co-ordinate, and the mortgagees become tenants in common of the mortgaged property in proportion to the amounts of their respective claims, and neither can gain any priority over the other by filing his mortgage first.

Appeal by plaintiff from a judgment of the district court for Douglas county, in favor of defendant, entered in pursuance of the findings and order of Searle, J. Affirmed.

H. Jenkins, for appellant.

C. J. Gunderson, for respondents.

MITCHELL, J.

Each of the parties holds a chattel mortgage on the same property, both executed by the same mortgagor, and the contest between them is as to whose mortgage is the prior lien. The defendant, upon default in the conditions of his mortgage, took the property from the mortgagor, and the plaintiff brought this action against him to recover the possession, claiming the right to it under his mortgage. The stipulated facts are substantially as follows:

The mortgagor was a resident of the town of Carlos, in Douglas county, and had made a contract with a firm in Indiana for the purchase of the property in controversy (a portable sawmill), to be delivered at the village of Alexandria on payment of the purchase money. The property was shipped by the vendor from Indianapolis, and, at the time both mortgages were executed, it was at the depot of the carrier railway company in Alexandria, awaiting delivery to the mortgagor upon his complying with the terms of the

contract by paying the purchase price. Both mortgages were executed on the same day, February 1. Neither party knew when he took his mortgage that the mortgagor had executed a mortgage to the other, but it does not appear which mortgage was executed first. After executing the mortgages, the mortgagor immediately paid the purchase money, and removed the property to his place of residence, in the town of Carlos, where it remained until it was taken from his possession by the defendant. Plaintiff filed his mortgage in the town of Carlos, on February 1, at 5 p. m., but never filed it in the village of Alexandria. Defendant filed his mortgage in Alexandria on February 1 at 3 p. m., and in the Town of Carlos on February 3.

Counsel have argued the case mainly upon the theory that the question of priority of lien depended upon the question which mortgage was first duly filed, the contention of the defendant being that they should have been filed in both the town of Carlos, where the mortgagor resided, and in the village of Alexandria, where the property was when the mortgages were executed. G. S. 1894, § 4130.

If priority of filing would give a priority of lien, we are strongly inclined to the opinion that, upon the facts, it was only necessary to file these mortgages in the town of Carlos, where the mortgagor resided. In view of the object of filing a chattel mortgage, to wit, to give notice to creditors and subsequent purchasers, much can be said in favor of the position that the provision requiring such instruments to be filed in the town, city, or village where the property is applies only to cases where it has, by reason of its character or its treatment by the mortgagor, acquired an actual situs different from the place of residence of the owner, and that it does not apply to a case like the present, where the property is merely in transit to the owner's residence, or where, for some merely casual or temporary purpose, the owner takes it to some other town; as, for example, where a farmer drives his team to the city or village on some brief errand of business or pleasure. But it is unnecessary to decide this question, as our conclusion is that this case must be determined upon other grounds.

These two mortgages having been executed on the same day, and there being nothing to show that one was executed at an earlier

hour of the day than the other, they must be taken as having been executed contemporaneously. The fact that one was filed before the other raises no presumption that it was executed first. *Walker v. Buffandeau*, 63 Cal. 312.

Where two mortgages are executed contemporaneously, and without any agreement of the parties that one shall take precedence over the other, the liens are co-ordinate, and the two mortgagees become tenants in common of the mortgaged property in proportion to the amounts of their respective claims, and neither can gain any priority over the other by filing his mortgage first; the statute as to filing being for the protection of subsequent purchasers or mortgagees.

It being elementary that one tenant in common cannot maintain replevin against his co-tenant, it follows that the judgment in favor of the defendant must be affirmed, although the trial court may have ordered it upon another and erroneous theory of the law. The courts will control the application and division of the proceeds of the mortgaged property in accordance with the rights of the respective parties, and, if necessary, appoint a receiver for that purpose.

Judgment affirmed.

STATE OF MINNESOTA ex rel. NILS C. BRUN and Others v. SVEN OFTEDAL and Others.

June 9, 1898.

Nos. 11,008—(30).

Charitable Corporation—Augsburg Seminary—Defective Articles—Amendment.

Five persons organized themselves into a private charitable corporation, under G. S. 1866, c. 34, tit. 3, by the name of "The Norwegian-Danish Evangelical Lutheran Augsburg Seminary." The articles were defective, in that they contained no provisions for the admission of new members. They provided for a board of five trustees (the five corporators being named as the first board), and fixed the time and place for their election, but did not state in express terms by whom they were to be elected. *Held*, that the power to amend the articles of incorpora-

tion and to admit new members and to elect trustees was vested in the five incorporators.

Same—Election of Trustees.

For nearly 20 years thereafter trustees of the corporation were elected by an unincorporated voluntary association called "The Conference of the Norwegian-Danish Evangelical Lutheran Church of America," composed of the ministers, theological professors, and delegates from the congregations belonging to the conference. The trustees thus elected assumed to perform all the duties of the office, with the consent of the incorporators, who during all that time neither exercised nor attempted to exercise any corporate powers. In February, 1877, the legislature passed an act (Sp. Laws 1877, c. 245) entitled "An act ratifying and confirming the election of trustees of the Norwegian-Danish Evangelical Lutheran Augsburg Seminary." In 1885 the trustees elected by the conference assumed to amend the articles of incorporation so as to provide for the election of trustees by the conference. In 1890 the conference formed a union with certain other religious bodies of substantially the same faith and form of government under the name of "The United Norwegian Lutheran Church of America." In 1892 the five original incorporators amended the articles of incorporation so as to provide for the admission of new members by the existing members, and then admitted 25 new members. The 30 members, as thus constituted, thereafter elected respondents (appellants here) to the offices of trustees of the seminary corporation. The conference of the United Church elected the relators to the same offices. In a proceeding by information in the nature of quo warranto, instituted by the relators to oust the respondents, and to induct themselves into the offices of trustees, *held*:

Quo Warranto—Relators Must Show Title to Office.

(1) The corporation being a private one, it was incumbent on the relators to show title to the offices in themselves before they could inquire into the title of the respondents.

Sp. Laws 1877, c. 245, § 3, Unconstitutional—Title of Act.

(2) That the prospective provisions of the third section of the act of 1877 are invalid, for the reason, if no other, that they are not expressed in the title of the act.

Charitable Corporation—Trustees—Power to Amend Articles.

(3) The trustees of a corporation, whether de jure or only de facto officers, are mere agents of the corporation, and have no authority to amend the articles of incorporation.

Same—Usage in Electing Trustees—Acquiescence—Membership.

(4) The usage or custom of the conference to elect the trustees of the corporation, although acquiesced in by the original incorporators for 20 years, did not have the effect of admitting to membership either the members of the conference or all the members of the congregations belonging to the conference.

Same—Curative Act.

Neither the curative act of 1877 nor the general curative acts of 1881 or subsequent years (G. S. 1894, §§ 3402-3405) had the effect of legalizing and authorizing the continuance of the usage or custom of electing trustees of the corporation by the conference.

Information in the nature of quo warranto in the district court for Hennepin county to oust Sven Oftedal, Olaf Hoff, Ole Paulson, Theodor Helgeson and Andrew Knutson from the offices of trustees of a corporation called the Augsburg Seminary and to induct relators into said offices. The case was tried before Russell, J., who found and ordered judgment in favor of relators. From an order, McGee, J., denying a motion for a new trial, respondents appealed. Reversed.

Fred T. Merritt and Brooks & Hendria, for appellants.

Relators must show title in themselves before they can inquire by what authority respondents exercise their office. High, Ex. Rem. § 652; *Miller v. English*, 21 N. J. L. 317; *State v. Kupferle*, 44 Mo. 154; *McDaniels v. Flower*, 22 Vt. 274; *State v. Hunton*, 28 Vt. 594; *State v. Brown*, 34 Miss. 688; *People v. Pease*, 30 Barb. 588; *People v. Thacher*, 55 N. Y. 525. The power of admission to, and expulsion from, membership in a corporation resides in the whole body, and cannot be delegated except by the charter. *State v. Chamber*, 20 Wis. 63; *Hibernia v. Com.*, 93 Pa. St. 264; 1 *Thompson, Corp.* § 847. The execution of the original articles of incorporation did not have the effect of incorporating the conference or its members as such. Nor does the fact that the five persons signing the articles of incorporation were the trustees of the conference change the case. They were not named as members of any church, nor as trustees, but as individuals; and even if they had incorporated as trustees of the conference, nevertheless, unless the trustees

were the conference before they became incorporated, their incorporation was not the incorporation of the conference. *Trustees v. Guthrie*, 86 Va. 125; *Wilson v. Perry*, 29 W. Va. 169. The corporation of Augsburg, upon the adoption and filing of the articles, followed by user, became a corporation, wholly distinct from and independent of the conference. The conference, being an unincorporated voluntary association, whose membership was constantly shifting and changing, could not own property, nor could any person, natural or artificial, own property in trust for it. *Trustees v. Clark*, 41 Mich. 730; *German Land Assn. v. Scholler*, 10 Minn. 260 (331); *Little v. Willford*, 31 Minn. 173; *Gille v. Hunt*, 35 Minn. 357; *Society of the Most Precious Blood v. Moll*, 51 Minn. 277; *Lane v. Eaton*, 69 Minn. 141; G. S. 1894, § 4274. The corporation existed as a legal entity, wholly distinct and apart from the conference. The latter body had no control over it, not even the power of visitation. It had no power or right to elect its officers, or in any respect to supervise its acts. *Stevens v. Willard*, 43 Vt. 692. Where the trustees or governors are incorporated to manage the charity, the visitorial power is deemed to belong to them in their corporate character. *Angell & Ames, Corp.* § 687; *Fuller v. Trustees*, 6 Conn. 532; 2 Kent, Com. 302; *Clark v. Oliver*, 91 Va. 421; *Ludlam v. Higbee*, 11 N. J. Eq. 342; *Perry, Trusts*, § 733; *Trustees v. Hunn*, 7 Tex. Civ. App. 249. The five original incorporators, in the first instance at least, comprised the whole membership of this corporation, and, unless new members were by some means previously admitted to the corporation, they retained the right to its exclusive control, and could lawfully amend its articles, as they undertook to do on August 3, 1892. The corporation became a corporation de facto, and though the incorporators, as such, held no meeting and performed no corporate act for twenty years they did not thereby forfeit their franchise or the property. *Morrill v. Little Falls*, 53 Minn. 371. Sp. Laws 1877, c. 245, or as least section 3, was invalid because not germane to the title of the act. *State v. Kinsella*, 14 Minn. 395 (524); *State v. Chapel*, 63 Minn. 535; *Brieswick v. Mayor*, 51 Ga. 639; *Williamson v. City*, 44 Iowa, 88; *People v. Mellen*, 32 Ill. 181; *Thomas v. Collins*, 58 Mich. 64; *Cooley, Const. Lim.* (5th Ed.) 179; *Mewherter v. Price*, 11 Ind. 199; *Ryerson v.*

Utey, 16 Mich. 269; *People v. Hills*, 35 N. Y. 449; *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 392 (515); *Mississippi & R. R. B. Co. v. Prince*, 34 Minn. 79; *State v. Murray*, 41 Minn. 123; *Simard v. Sullivan*, 71 Minn. 517.

Orville Rinehart, for appellants, also filed a brief.

Emanuel Cohen and *Andreas Ueland*, for respondents.

MITCHELL, J.¹

This proceeding is an information in the nature of quo warranto, instituted by the relators against the respondents (appellants here) to oust them from the offices of trustees of a corporation called the Augsburg Seminary, and to induct the relators into the offices. The very voluminous record contains a vast amount of matter which we consider wholly irrelevant to the issues.

The following statement contains all the facts that are at all material: The Conference of the Norwegian-Danish Evangelical Lutheran Church of America was a voluntary unincorporated association, composed of such Norwegian and Danish Evangelical Lutheran congregations and ministers as should adopt the constitution of the conference. Each congregation was represented in the conference by not more than two delegates, elected by the congregations themselves. The instructors in the theological seminary of the association were also members of the conference. The conference had adopted a constitution or body of rules providing, among other things, for the election by itself of a board of trustees to have charge of the temporal affairs of its theological seminary and a board of directors to have charge of its internal affairs, such as the course of study, the admission of students, etc. This seminary was located at Marshall, Wisconsin. The theological creed or confession of faith adopted by the constitution of the conference was the Holy Scriptures of the Old and New Testaments as God's revealed word, and the only rule of faith, teaching and life, the symbolical and confessional writings of the Norwegian-Danish Lutheran Church as a true and pure statement of the teachings of the Word of God, and consisting of the ancient symbols,—the Apos-

¹ BUCK, J., absent, took no part.

tolic, Nicene, and Anthanasian,—and the unaltered Augsburg Confession and Luther's Smaller Catechism, understood in harmony with the exposition thereof contained in the remaining Lutheran confessional writings.

In 1871 certain citizens of Minneapolis offered the conference real and personal property of the value of about \$4,000 as an inducement to remove the seminary to that city. Part of the property consisted of a proposed building site. The conference accepted the offer, and appointed a building committee with authority to erect a seminary building on the donated site with the remaining means given by the citizens of Minneapolis and contributions by the congregations belonging to the conference. This building was in process of erection when the conference held its annual meeting in 1872. At that meeting it elected, in accordance with its previous custom and the rules previously adopted, a board of five trustees, to have charge of and manage the property and temporal affairs of the seminary. These trustees accepted the office, and entered upon the discharge of their duties as such. It being deemed necessary that a corporation should be formed to take and hold the title to the seminary property, five persons (called in the record the original incorporators), in July, 1872, attempted to organize themselves into a corporation, under G. S. 1866, c. 34, tit. 3, under the name of "The Norwegian-Danish Evangelical Lutheran Augsburg Seminary."

The trial court found that these persons were the five trustees of the seminary previously elected by the conference. This finding is challenged by the appellants as not justified by the evidence. While we cannot find any express or direct evidence that such was the fact, we think it is clearly inferable from what followed. These incorporators actually adopted, signed, and filed articles of association, and proceeded to transact business by taking and holding the title of the seminary property in the corporate name. Hence, in view of the curative acts of 1881, 1885, 1887, and 1891 (G. S. 1894, §§ 3402-3405), as well as of Sp. Laws 1877, c. 245, it became a corporation de jure as well as de facto, notwithstanding its failure to comply with the statutes in other respects. The purpose of the corporation, as stated in its articles, was

"The training and education of young men for the ministry of the Lutheran church in the United States by the establishing and maintaining of a theological seminary at Minneapolis, and furnishing instruction to students therein, with such preparatory aid thereto as the trustees of this corporation may deem proper."

The articles were defective, in that they contained no provisions for the admission of new members. They named a board of trustees (the five incorporators, and, as we think the evidence shows, the same persons who had been previously elected by the conference) to conduct the affairs of the seminary until the next annual election "as herein provided." The articles also provided that the time for electing trustees should be in the month of June in each year (the date of the meeting of the conference), "at such place as the annual conference of the Norwegian-Danish Evangelical Lutheran Church of America may be held," but failed to state—at least in express terms—by whom the trustees were to be elected. But it is very evident from the language used, in connection with the prior and subsequent conduct of all concerned, that the intention and expectation was that the trustees of the seminary were to be elected by the conference as theretofore.

The "incorporators" or "trustees" reported to the conference in June, 1873, what they had done, and the reason therefor, to-wit, for the purpose of holding the legal title of the seminary property for the conference. It does not appear that the conference took any formal action approving what had been done, but it made no objection, and by its subsequent conduct acquiesced in and approved of it. At that meeting, and annually thereafter for nearly 20 years, the conference elected trustees, who, under its direction, had the exclusive management and control of the property and temporal affairs of the seminary, and annually made a report to the conference of what they had done. They took the title to all property donated or contributed for the extension or maintenance of the seminary in the corporate name. During that time large contributions were made for the enlargement and support of the seminary, and now it has real and personal property of the value of \$75,000. Aside from the donations by citizens of Minneapolis already referred to, and subsequent donations by them of between \$3,000

and \$4,000, all, or substantially all, of the funds for the support or improvement of the seminary were contributed by members of the congregations belonging to or affiliated with the conference.

During all this time the original incorporators held no meeting, and neither exercised nor asserted any right to or authority over the property or affairs of the seminary, or interposed any objection to the right of the conference to elect trustees, or to the right of such trustees to manage the affairs of the seminary. In fact, up to 1892 the only corporate act which they ever did or attempted to do was the execution and filing of the articles of association. For some time after the incorporation the boards of trustees elected by the conference consisted exclusively or mostly of these incorporators, and frequently in subsequent years some of the incorporators were elected trustees; and in every instance they accepted the office, and fully recognized the authority of the conference by reporting to it and obeying its instructions. Moreover at every annual meeting of the conference from 1873 to 1890, inclusive, two or more of these incorporators were in attendance and participated in the proceedings of the conference without interposing any objections to its election of trustees of the seminary.

In 1876 the trustees in their report to the conference called its attention to the defect in the articles of incorporation of the seminary, and recommended that they be amended so as to provide for the election of trustees by the conference. The conference approved of the proposed amendment, and subsequently, at the instance of the trustees and members of the conference, the legislature enacted Sp. Laws 1877, c. 245, entitled "An act ratifying and confirming the election of trustees of the Norwegian-Danish Evangelical Lutheran Augsburg Seminary." Section 1 of the act ratified and confirmed the election of trustees as the same had been theretofore elected by the conference. Section 2 ratified and confirmed all the official acts of said trustees theretofore done and performed in accordance with the articles of incorporation and the by-laws of the seminary. Section 3 amended article 5 of the articles by adding thereto the words, "The trustees aforesaid shall be elected by the Conference of the Norwegian-Danish Evangelical Lutheran Church of America." Both the trustees and the confer-

ence accepted the provisions of the act by acting under them, and the original incorporators made no objection.

In 1883 the conference passed a resolution directing the board of trustees to have the articles of incorporation of the seminary changed so that thereafter the trustees should be elected in the following manner, viz.: The first time, two trustees for three years, two for two years, and one for one year; and after that they should be elected, as their terms expired, for three years. Pursuant to this direction, the board, in 1885, adopted a resolution purporting to amend article 5 so as to read as follows:

"The board of trustees of this corporation shall consist of five (5) members. They shall be elected at and by the annual meeting of the Conference of the Norwegian-Danish Evangelical Lutheran Church of America, and shall hold office for three (3) years from the time of election, and until their successors shall be elected and shall have signified their acceptance of office. Of the trustees elected in 1885," A. and S. "shall hold office for three (3) years," O. and K. "for two (2) years, and" P. "for one (1) year."

The object of this amendment was that the terms of office of only a part, and not of the whole board, as theretofore, should expire in any one year. A certificate of this amendment, signed by the president and secretary of the board (but not sworn to by any one), was filed in the offices of the register of deeds and of the secretary of state, and thereafter the conference elected trustees in conformity with its provisions.

In addition to this conference, there existed three other Scandinavian Lutheran associations or bodies, respectively known as "The Anti-Missourian Brotherhood," "The Norwegian Augustina Synod," and "The Hauges Synod." Negotiations had been pending for some time looking to a union of all four in one association or body to be known as "The United Norwegian Lutheran Church of America," called in the record "The United Church." In 1889 committees representing these bodies formulated a proposed plan of union called "Articles of Union," and a proposed constitution for the United Church. These articles of union were unanimously adopted by the conference of the Norwegian-Danish Evangelical Lutheran Church of America at its annual meeting in 1889, and at

the same meeting the conference adopted the proposed constitution as a proposed amendment to its existing constitution, to be adopted at its annual meeting in 1890; and as such it was submitted for approval to the congregations belonging to the conference. They having approved of it, it was unanimously adopted by the conference at its annual meeting in 1890. The Hauges Synod did not adopt it, and never entered into the union.

It is claimed by the appellants that there is no evidence that the constitution was ever adopted by the Anti-Missourian Brotherhood or the Norwegian Augustina Synod; but we think it is wholly immaterial whether they did or did not adopt it. It does appear that each of these bodies did contribute to the United Church the sums of money provided for in the articles of union, and that the larger part of their congregations entered into the union. Of the 247 congregations belonging to the conference of the Norwegian-Danish Evangelical Lutheran Church of America, 217 entered into the union. As soon as the conference adopted the proposed constitution of the United Church, it adjourned, and its members united with the members of the Brotherhood and the Augustina Synod in organizing the conference of the United Church.

The confession of faith adopted in the constitution of the United Church consisted of the Holy Scriptures of the Old and New Testaments as God's word, and the only source and rule of faith, doctrine and life; the symbolical book or books of the Norwegian Evangelical Lutheran Church as a true embodiment of the doctrine of the Word of God, viz. the old symbols,—Apostolic, Nicene, and Athanasian,—and the unaltered Augsburg Confession and Luther's Smaller Catechism. It is contended that this differs essentially from the theological creed or confession of faith contained in the constitution of the old conference, but the points of difference, if any, are too microscopic to be detected by the judicial eye. It differed somewhat from the old constitution in some matters relating to membership and representation. But all of these amendments were authorized by, and adopted in accordance with, the provisions of chapter four of the old constitution.

The articles of union evidently contemplated that certain institutions of learning, and their property, theretofore belonging to and under the control of the several bodies forming the union, should belong to and be under the control of the United Church, and that, in order to carry this into effect, the United Church should become incorporated. The articles of union expressly provided that the Augsburg Seminary should be the theological school of the United Church. Consequently, at its annual meeting in June, 1891, the representative conference or assembly of the United Church adopted articles of incorporation, under Laws 1885, c. 151 (see G. S. 1894, §§ 3062-3069), under the name of "The United Norwegian Lutheran Church of America," the general purposes and powers of which were to receive, purchase, hold, convey, and manage property, real and personal, for religious, charitable, and educational purposes, and to transact all secular business and manage all temporal affairs of the church. The powers of the corporation were to be vested in and exercised by a board of nine trustees, to be elected by ballot at the annual meetings of the church, consisting of the duly-elected delegates of the congregations and their pastors, in accordance with the constitution of the United Church.

After thus incorporating, the church requested the trustees of the seminary to convey and transfer all of its property to the church. The then-acting trustees of the seminary, as we understand the evidence, had been elected by the old conference. The trustees declined to make the transfer, for the reason that, as advised by legal counsel, they had no power to do so. Thereupon, after considerable negotiation, not here important, the church requested the trustees to amend the articles of incorporation of the seminary so as to provide for the election of its trustees by the United Church. It was at this point that the real controversy arose.

As previously conducted, the seminary had a preparatory or academic department as an auxiliary or adjunct to the theological school. Inasmuch as the United Church had other institutions, particularly St. Olaf's, at Northfield, the discontinuance of the preparatory department of the Augsburg Seminary was contemplated. The trustees and "friends of Augsburg" declined to do anything towards giving the church control of the seminary unless they ob-

tained some positive guaranty that its preparatory or academic department should be continued. Upon this question the parties could not or would not agree. Finally, the five original incorporators, upon the theory that they were the sole members of the corporation, met, and amended the articles of incorporation by providing, among other things, that

"Any person who is a member in good standing of a Norwegian Lutheran church connected with the United Norwegian Lutheran Church of America may become a member of this corporation by being elected as such member by a majority vote of the then members of the corporation, and by his acceptance in writing of such election: provided, that as soon as, and whenever, the members of this corporation shall exceed thirty (30) in number, a two-thirds (2-3) vote of such members shall be necessary in order to elect new members."

Subsequently, after the controversy waxed warm, they again amended the articles by striking out the words "connected with the United Norwegian Lutheran Church of America," thus removing the last vestige of control or connection of the United Church over or with the seminary. This was the first time the original incorporators had exercised or asserted the right to exercise any corporate powers since they adopted the articles of incorporation in 1872. They further amended the articles by providing for the election of a board of five trustees by the members of the corporation at their annual meeting, whose term of office should be five years; also by designating five trustees to hold office respectively until the annual elections in June, 1893, 1894, 1895, 1896, and 1897. Under these amendments the five original incorporators elected 25 other persons as members of the corporation.

One of the appellants claimed to hold the office of trustee under the appointment under the last of these amendments, by which his term of office was not to expire until June, 1897, which was subsequent to the commencement of these proceedings. The other appellants claimed under elections by the 30 alleged members of the corporation, constituted as above, at their annual meetings in 1893, 1894, 1895, and 1896, respectively. This is the source of appellants' title to the offices. The conference of the United Church made no

attempt to elect trustees of the seminary until its annual meeting in June, 1896, at which it elected the relators to the office, the terms of office of all the last board elected by the old conference before the union having then expired.

Much evidence was introduced, and much is said in the briefs of appellants' counsel, as to the alleged fact that the prosperity of the seminary and the donations towards its enlargement and support were largely the results of the efforts of the so-called "friends of Augsburg" prior to the union; also that the seminary is now being efficiently managed by the appellants. Assuming all this to be true, we fail to see that it has any bearing on the legal issue in this case, which is the title to an office. The same may be said as to the alleged hostile acts of the United Church towards the seminary since this controversy commenced, by withdrawing their support from it, establishing another theological school, and expelling congregations and ministers for upholding the conduct of the appellants and the other "friends of Augsburg." Those things have nothing to do with the legal questions involved, and of their ethical character we are not the judges.

Great stress is also laid upon the fact that until 1896 the United Church never asserted, nor attempted to exercise, the right to elect the trustees of the seminary, but, on the contrary, admitted by their conduct that they had no such power. This amounts to nothing more than evidence of their views of the law at that time. There is nothing in it that would estop the United Church from afterwards asserting and exercising the right to elect trustees, if they in fact possessed the legal power to do so.

Without considering whether, upon these facts, the old conference had, or the United Church has, any right, cognizable in law or equity, to the management and control of Augsburg Seminary, or of the property the title of which is vested in that corporation, two facts conclusively appear:

First, that the intended beneficiary was, not the professors who might be appointed to teach, or the students who might be taught, in the institution, but the religious body or denomination represented by the Conference of the Norwegian-Danish Evangelical

Lutheran Church of America, the objects, as expressed in the articles of incorporation, being the training and education of young men for its ministry.

Second, that the intended object of the incorporation was solely to create a legal entity which might hold the legal title of the property donated or to be donated for the establishment and maintenance of a theological school for the denomination (the conference being unincorporated, and there not being then, or until 1885, any statute by which it could become incorporated), and that the actual intention and supposition was that the management and control of the seminary would be and remain, as before, in the conference, exercised through a board of trustees elected by itself.

The conduct of all parties concerned for 20 years is practically conclusive on this point, and the fair presumption is that contributions and donations during that time by members and friends of the denomination for the support and maintenance of the seminary were made upon the assumption that such was the fact. Some of the property, including the site upon which the buildings were erected, already belonged to the conference, as far as an unincorporated voluntary association of this kind could be the owner of property. It also appears clear to us, as a legal proposition, that the change of name and other minor changes in the constitution do not destroy the identity of the conference and the United Church, that the latter is but the continuation of the former, and that whatever rights, if any, the old conference had to the control of the seminary and its property are now vested in the United Church. *McGinnis v. Watson*, 41 Pa. St. 9. It is neither appropriate nor necessary at this time to determine whether the church has any such rights recognized by the law, or, if so, what the proper remedy would be. But, if it has any such right of which it has been deprived, a court of equity is equal to every emergency, and its machinery and process are sufficiently flexible to meet it.

But the sole question here is, which of the parties, relators or appellants, have the title to an office in a private corporation? The relators must, therefore, show title in themselves before they can properly inquire by what authority the respondents (appellants here) exercise their office. High, Extr. Rem. § 652. The power to

elect the trustees or directors of a corporation belongs (at least in the absence of a statute providing otherwise) exclusively to the members of the corporation. The relators were elected by the conference of the United Church. Therefore it is incumbent on them to show that the members of that conference, either individually or collectively, were the members of the corporation. They were certainly not made such by the original articles of incorporation. As these articles were originally adopted, the five incorporators were the only members, in whom exclusively was vested the power to amend the articles and admit new members.

Assuming, as we think the law is, that the first and second sections of Sp. Laws 1877, c. 245, are valid under the doctrine of *Green v. Knife Falls Boom Corp.*, 35 Minn. 155, 27 N. W. 924, they are purely curative or retrospective, and merely validate what had been done in the past. The title of the act is wholly insufficient to embrace the prospective provisions of the third section, which is, therefore, wholly void under section 27 of article 4 of the constitution, even assuming that the legislature had the power to pass them under a proper title. The attempted amendment of the articles of incorporation in 1885 by the trustees elected by the conference in and of itself amounted to nothing, for even conceding that they were trustees de facto, they were the mere agents of the corporation, and had no power to amend the articles.

Counsel urged several other grounds in support of relators' title to the offices, but we think they may be all summed up in the proposition that all the ministers and members of the congregations belonging to the conference, or at least the members of the conference, became the members of the corporation by the mutual consent of the incorporators and the conference, as evidenced by their conduct. This may be very cogent evidence that the articles were adopted under a mutual mistake of both the incorporators and the conference as to their legal effect. The incorporators may also be estopped by their conduct from denying the validity of the official acts of the acting trustees elected by the conference. They may also have lost their membership by abandonment and nonuser for 20 years. But we are unable to discover any legal principle upon which it can be held that a usage or custom contrary to ex-

press statute, and based upon a misapprehension as to the relation of the parties to the corporation, can have the effect of making the membership of the congregations or of the conference members of the corporation. Indeed, there is no evidence that the members of the conference ever supposed or understood that they were members of the corporation. It is true that it appears that they supposed they had the right to elect its trustees, but they never assumed to exercise the corporate right to amend the articles of incorporation. On the contrary, whenever they thought these articles ought to be amended, they requested the trustees, whom they had elected, to do so. If this proves anything, it is that they supposed these trustees were the members, and the only members, of the corporation.

The statute (G. S. 1894, § 2917) expressly provided that the articles of incorporation, if amended, should be amended by the members of the corporation; also that they should contain the terms of admission to membership (section 2914). The very purpose of this latter provision is to remove, as far as possible, all doubt or controversy as to who are members. If the articles had provided who might be admitted, and how they should be admitted, these provisions would have controlled; but, if the relators' contention is correct, a corporation whose articles contain no such provisions has greater powers in that respect than one which has complied with the statute, and can, by virtue merely of an illegal custom or usage, admit to membership the members of an entire religious denomination or of an unincorporated voluntary association whose membership is uncertain and ever shifting and changing, and thus throw the membership of the corporation into a state of complete confusion and uncertainty. The power to determine who should be admitted or excluded from membership in the congregations belonging to the conference was vested in the several congregations themselves; also the power to elect their own delegates to the conference. The conference had the exclusive power of determining who were entitled to seats in it; in other words, who were its members. Hence, whether it be held that all the members of all the congregations or only the members of the conference became members of the corporation, its membership would be all in the air,

—one thing to-day and another thing to-morrow,—and that, too, without any corporate act either admitting new or expelling old members. The power of admission to and expulsion from membership are corporate acts of equal dignity, the exercise of which cannot be delegated except by the charter.

Usage can never alter or repeal a statute, otherwise usage would be superior to the power of the legislature. The right to be a corporation is a franchise. This franchise resides in the corporation itself. It is a privilege not existing at common law, but only given by the express authority of the state. Unlike a conventional contract between natural persons, the state is a party to it, and when the legislature has prescribed the nature and extent of the franchise, and how it shall be exercised, the courts will never permit it to be enlarged or changed by a usage or custom in violation of the statute.

It should also be stated in this connection that there was no statute, at least until 1893, by which a corporation of the character of Augsburg Seminary could authorize any other body or association to elect its trustees. The only case cited by relators' counsel in support of their contention is *State v. Sibley*, 25 Minn. 387. In that case the persons claiming to be members, other than those named in the charter, were regularly admitted to membership by the charter members, and for nearly 30 years exercised the rights of members at all the corporate meetings, and were recognized as members by the corporation, but failed to sign the constitution as required by the by-laws; and all that this court really decided was that, upon these facts, they were members notwithstanding their failure to sign the constitution. It was held in that very case that the right of exercising the corporate powers conferred by the charter resided in the whole body of its members acting in an organized capacity.

There is one other point that should be referred to. Counsel for relators suggest that the several curative acts, particularly the special one of 1877, "operated upon the then status" of the corporation. If we understand them correctly, they mean by this that these acts operated upon this usage and custom of the conference to assume to exercise the rights of corporate membership by electing the trus-

tees of the corporation so as to authorize the continuance of such custom. If such is the effect of curative acts, they are exceedingly dangerous. But all that need be said in answer to this is that all of the provisions of the act of 1877 that are germane to its title are merely curative and retrospective, and that all that the general curative acts assume to do is to change into de jure corporations de facto corporations which had been attempted to be organized under the general laws of the state, and to legalize their past acts, performed while they were only de facto corporations. They do not assume to attempt to legalize or authorize any and every usage or custom in violation of their own articles which they may have theretofore indulged in or were indulging in at the time the act was passed.

Our conclusion is that, the relators having failed to show any title to the offices in themselves, the order appealed from should be reversed, and the proceedings remanded, with directions to the court below to quash the information. It is so ordered.

CANTY, J.

I concur. This corporation was so irregularly organized, and has been so irregularly conducted, that it seems to me there is now no way to appoint de jure officers for it. By force of the curative act (Sp. Laws 1877, c. 245), the corporation itself may have a de jure existence; but this curative act merely legalizes what had been done in the past, and does not provide any method of proceeding to elect members or officers in the future. The five original incorporators were mere trustees for the beneficiary, which was represented by the conference. They surrendered their trust to their successors about 25 years ago, before said curative act was passed, and while the articles of incorporation were so defective that the corporation was only a de facto corporation. Under these circumstances the original incorporators cannot now be regarded as members of the corporation, and for years the corporation has had nothing but de facto members and officers, viz. the trustees appointed from time to time by the conference, and each set of these de facto officers and members has in turn surrendered their trust to their

successors, and ceased to be even *de facto* members of the corporation.

It may be true that said curative act legalized the appointment of the particular set of trustees in office when the act was passed, and, if so, they can with much more show of reason claim to be the present *de jure* trustees than can the five original incorporators. But when the term of said set of trustees expired they stepped out, as under the circumstances it was their duty to do, and were succeeded by another set; so that they in fact ceased to be either members or trustees, as was the intention of all parties. It cannot be held that this curative act made a corporation wholly different from what all parties had always intended it to be, or gave the officers and members thereof a tenure of office or membership wholly different from what was intended. The acting trustees were the only members. When their term expired they ceased to be members, and no way was provided, either by articles of incorporation or statute, for the selection of new members or officers.

The later curative acts found in the general statutes do not apply to corporations which cannot be organized under the general laws of this state. This corporation is one which could not be organized under any general law, and be given the powers that have always been exercised in connection with it. There is no authority under the general statutes for organizing a corporation whose officers and members shall be selected for a limited time by some voluntary unincorporated association. And if this practice is rejected in this case, there is no way in which such officers or members can be selected, and the corporation will have none; therefore these general curative acts do not apply. We have, then, an irregular, anomalous corporation, whose past acts were at one time legalized, but the terms of its officers and members expired, and there is no legal way to appoint new officers or members. The relators are therefore not legal officers of the corporation.

ROSA J. GRIBBLE v. W. O. LIVERMORE.

June 9, 1898.

Nos. 11,118—(142).

Tax Judgment—Insufficient Description—Evidence to Identify “Ninninger’s Addition.”

The defendant claimed title to the south half of lots 13, 14, 15 and 16 in block 4 in Ninninger’s addition to the city of St. Paul, in Ramsey county, under a tax judgment which, as respects the description of the property, was in the following form:

Subdivision of Section, Lot, or Block. Ninninger’s Addition.	Section or Lot.	Township or Block.	Range.	No. of Acres.
S. ½ of 13, 14, 15, and	16	4		

There was no evidence that there was a Ninninger’s addition in the city of St. Paul, or that there was no other Ninninger’s addition in Ramsey county, or any evidence of any kind aiding, explaining, or applying the above description. *Held*, that the description was insufficient, and the tax judgment void, as respects the premises in controversy.

Appeal by defendant from a judgment of the district court for Ramsey county in favor of plaintiff, entered in pursuance of the findings and order of Willis, J. *Affirmed*.

Howard L. Smith, for appellant.

Edwin Gribble, for respondent.

MITCHELL, J.

This was an action to determine an adverse claim of the defendant to the south half of lots 13, 14, 15, and 16 in block 4, Ninninger’s addition to the city of St. Paul, in Ramsey county. It is admitted that plaintiff has the title unless it has been divested by the tax title under which defendant claims. The case was here on a former appeal, in which we affirmed the order of the trial court granting plaintiff’s motion for a new trial. 64 Minn. 396, 67 N. W. 213. Upon the second trial the court found that the tax judgment under which defendant claims was in the form set out in the double page contained in the record, which, as respects the description of the property, is as follows:

Subdivision of Section, Lot, or Block. Ninninger's Addition.	Section or Lot.	Township or Block.	Range.	No. of Acres.
S. ¼ of 13, 14, 15, and	16	4		

No error is assigned as to this finding. There is neither evidence nor finding aiding, explaining, or applying this description. We are of opinion that it is fatally defective, and hence that the judgment is void. There is nothing in the description to show that the lots attempted to be described as the Ninninger's addition referred to are in the city of St. Paul. If it had been made to appear that there was a Ninninger's addition in St. Paul, and that there was no other Ninninger's addition in Ramsey county, it might have been sufficient; but, in the absence of any such showing, it is impossible to hold this to be a good description.

The trial court held that this tax judgment was void and of no effect as respects the land described in the complaint, and that plaintiff was entitled to judgment quieting her title to the property against any right, title, interest, claim, or lien of the defendant therein or thereto; and judgment was entered accordingly. So far as appears, the defect was exclusively in the judgment, and not in the assessment.

It also appears that, when the defendant took his state assignment certificate, he paid all subsequent delinquent taxes on the premises described in the complaint, as well as the amount for which the land was sold on the judgment; also that he has since paid the taxes for 1891 on the same premises, and it does not appear that the plaintiff has paid any of these taxes into court for the benefit of the defendant, as required by the first proviso of G. S. 1894, § 1610, in actions to vacate or set aside a tax judgment. Neither party has referred to this matter in his brief, and we have no time to examine it.

The judgment is affirmed, but without prejudice to the right of the defendant to apply to the court below to have the judgment vacated until the plaintiff complies with the provisions of the statute referred to, or to have it modified so as to save his lien for the amount of taxes which he has paid.

STATE OF MINNESOTA v. FREDERICK WEYERHAUSER and Others.

June 9, 1898.

Nos. 11,136—(34).

Taxes—Property Previously Omitted or Undervalued—Laws 1893, c. 151—Federal Constitution.

Laws 1893, c. 151, providing for the taxation of property previously unlawfully omitted from the assessment or grossly undervalued, is not in conflict with the provisions of the federal constitution that no state shall pass any law impairing the obligations of contracts, or deny any person within its jurisdiction the equal protection of its laws, or deprive him of his property without due process of law.

Proceedings in the district court for Itasca county to enforce payment of taxes for the year 1894. Judgment in favor of the state having been entered in accordance with the mandate of this court, pursuant to the decision reported in 68 Minn. 353, at the request of defendants the case was certified to this court. Affirmed.

John B. Atwater, for appellants.

H. W. Childs and *George B. Edgerton*, for respondent.

MITCHELL, J.

These proceedings were under the same statute, and are identical in all material facts with those of the same title considered in 68 Minn. 353, 71 N. W. 265, in which the statute (Laws 1893, c. 151, G. S. 1894, § 1633), was assailed as being in violation of certain provisions of the constitution of the state. In addition to the objections there urged against the validity of the statute, it is now urged that it is in violation of certain provisions of the federal constitution, particularly article 1, § 10, providing that no state shall pass any law impairing the obligation of contracts, and the fourteenth amendment, which provides that no state shall deprive any person of his property without due process of law, or deny any person within its jurisdiction the equal protection of the laws.

These fundamental constitutional principles are common to both the federal and the state constitutions, and the only effect of making them a part of the former is to render the supreme court of the United States the final arbiter in cases where their violation by a

state is complained of. Therefore, inasmuch as our former decision covers every question now raised, and as the principal object of bringing the present proceedings before this court is to make a record upon which the constitutionality of the statute referred to may be passed upon by the supreme court of the United States, we do not feel called upon to do much more than to affirm the judgment upon the grounds stated in our former opinion.

We shall only make the following suggestions, viz.: Real-estate taxes assessed under this statute cannot be collected or enforced by distraint of goods, but can be collected or enforced only by proceedings in the nature of a civil action against the land, of which the owner has notice, which is "due process of law" as applied to such proceedings, and in which he may interpose by way of defense all objections to the tax which go to the merits of the proceedings; also, that there is no distinction in principle between a case where land has wholly escaped taxation by reason of its omission from the assessment roll and one where, by reason of a fraudulent or grossly inadequate assessment, it has escaped a part of its just share of the public burdens.

Judgment affirmed.

JULIUS W. SHADEWALD v. ALONZO PHILLIPS.

June 9, 1898.

Nos. 11,172—(129).

Amendment of Statute "So as to Read as Follows"—Repeal of Prior Act.

Rule applied that, where an act provides that a prior statute "shall be amended so as to read as follows," the amendatory act is a substitute for the original statute, and repeals all those parts of the prior act which are omitted.

Exemption—Bicycle—Laws 1895, c. 37—Laws 1897, c. 6—Wagon.

Laws 1897, c. 6, repealed Laws 1895, c. 37, exempting a bicycle. A bicycle is not a "wagon," within the meaning of the exemption.

Appeal by plaintiff from an order of the district court for Hen-

nepin county, Elliott, J., sustaining a demurrer to the complaint. Reversed.

James Robertson, for appellant.

E. R. Lynch, for respondent.

MITCHELL, J.

This action was brought against the defendant, as sheriff, to recover damages by reason of his neglect and refusal to levy, under an execution in favor of the plaintiff and against the property of his judgment debtor, upon a bicycle owned by the latter. The appeal is from an order sustaining a demurrer to the complaint on the ground that it did not state a cause of action. Both parties agree in stating that the only question in the case is whether Laws 1897, c. 6, repealed Laws 1895, c. 37. Both of these acts were amendments to G. S. 1878, c. 66, § 310, subd. 9 (see G. S. 1894, § 5459). Section 310 (section 5459), so far as here material, reads as follows:

"No property hereinafter mentioned or represented shall be liable to attachment, or sale on any final process, issued from any court in this state. * * * Ninth. One sewing machine."

The act of 1895 provided that section 310 (section 5459) should be amended by adding to the ninth subdivision the following words, to wit, "and one bicycle." Hence it would then read "one sewing machine and one bicycle." The act of 1897 provided that the ninth subdivision of section 310 should be amended so as to read as follows: "Ninth. One sewing machine and one typewriting machine." After this statement, argument or discussion would seem unnecessary. After the passage of the act of 1895, the only section 310 in existence was as amended, and this was the only one to which the subsequent act of 1897 could apply.

When an act is passed providing that a prior statute shall be amended "so as to read as follows" it is elementary that the statute as amended is a substitute for the original, and repeals those parts of the former law which are left out of the substitute. *Sutherland*, St. Const. § 137; *St. Paul, M. & M. Ry. Co. v. Broulette*, 65 Minn. 367, 67 N. W. 1010. The error into which defendant's counsel has fallen is in assuming that the original section 310, c. 66, G. S. 1878,

and the amendment of 1895 remained separate and independent statutes, and that the amendment of 1897 refers to or affects only the former, but leaves the latter in full force. We have found that it is not uncommon for the legislature by amendatory acts unintentionally to effect a repeal by looking at the General Statutes and overlooking subsequent amendments.

At the close of his brief, counsel for the defendant suggests that a bicycle is exempt under another subdivision of section 310 which exempts "one wagon, cart or dray," and cites *Allen v. Coates*, 29 Minn. 46, 11 N. W. 132, and *Kimball v. Jones*, 41 Minn. 318, 43 N. W. 74, in the former of which we held that a light open buggy with side springs, and in the latter that a two-seated upholstered carriage built for easy riding, and suited only for use as a family carriage, were "wagons," within the meaning of the statute. We have always held that exemption laws should be construed with reasonable liberality in favor of the debtor, but we have gone far enough in that direction in holding that vehicles of the kinds referred to were exempt as "wagons," and must draw the line at bicycles.

Order reversed.

STATE OF MINNESOTA v. THEODORE WILSON and Another.

June 9, 1898.

Nos. 11,196—(27).

Swindling by Device under G. S. 1894, § 6595—Padlock upon Sidewalk—Wager with Stranger—Pretended Arrest by Policeman.

W., C., and F. were confederates in swindling one Cook, which was committed substantially as follows: C., having struck up an acquaintance with Cook, proposed a walk, and while walking pretended to have found on the sidewalk a small padlock, which he exhibited to Cook, and showed him how it could be opened without a key by touching a secret spring. Subsequently they met W., a pretended stranger, to whom C. showed the lock, stating that he (W.) could not open it without a key. W. offered to bet \$10 that he could. C. accepted the bet, and called Cook aside, saying: "I only got \$5. * * * You throw in \$5, and I will give it

79	522
73	163
72	522
82	345
72	522
84	361

back to you when we learn W. a lesson." Cook gave C. the \$5, which, with \$5 of his own, G. gave to W. While W. was pretending to be attempting to open the lock, F. came up, and, personating a policeman, and displaying a policeman's star on his coat, threatened to arrest them for gambling on the street. W. ran away with the money, and then F. arrested C. and Cook, and pretended to be taking them to the police station. On the way, F., having ascertained how much money Cook had, released him upon his paying him \$50, and promising to leave the city. *Held*, that the \$5 was obtained from Cook by means of a false token, trick, or device, within the meaning of G. S. 1894, § 6595, notwithstanding the fact that he did not join in the bet, and had at the time such confidence in C. that he would have let him have the money for a purpose other than betting on the lock.

Same—Evidence—Subsequent Acts.

Also, that it was competent to prove what happened after F. appeared on the scene, for the purpose, if no other, of characterizing what had preceded, the whole being all one transaction, and done in furtherance of the scheme to swindle Cook.

Same—Intent—Evidence of System—Successive Swindles.

Where the crime for which a defendant is being tried is one of a system of successive frauds or swindles of the same kind in which he had been engaged, it is competent for the state to prove that fact, as tending to prove a criminal intent.

Same—Evidence—Subsequent Possession of "Star."

It was also competent to prove that when C. was arrested, about two months after the commission of the offense, he had upon his person a policeman's star similar to the one worn and displayed by F.

Appeal by defendants from an order of the district court for Hennepin county, Smith, J., denying a motion for a new trial. Affirmed.

T. A. Garrity, for appellants.

H. W. Childs, Attorney General, and *Jas. A. Peterson*, County Attorney of Hennepin County, for respondent.

MITCHELL, J.

The defendants Wilson and Carlson were indicted, tried, and convicted, under G. S. 1894, § 6595, of the crime of swindling. The statute referred to reads in part as follows:

"Whoever by means of three-card monte, so called, or of any other form or device, sleight of hand or other means whatever, by use of cards or instruments of like character, or by any other instru-

ment, trick, or device, obtains from another person any money or other property of any description, shall be deemed guilty of the crime of swindling."

The evidence tends to prove substantially the following state of facts: The defendant Carlson struck up an acquaintance on the streets of Minneapolis with the complainant, Cook, who was a stranger from the country, and, after going into a saloon to get a drink, proposed to him to take a walk. While walking, Carlson stooped down, and pretended to have found on the sidewalk a small padlock, which he exhibited to Cook, and showed him how it could be opened without a key by pressing on a secret spring. After walking a short distance further, they were met by defendant Wilson, an apparent stranger, who asked for a match to light a cigar. This being furnished, Carlson showed Wilson the lock, and asked him if he could open it without a key. Wilson said he could, and offered to bet Carlson \$10 that he could. Carlson accepted the bet, and then, calling Cook aside, said: "I only got \$5. * * * You throw in \$5, and I will give it back to you when we learn Wilson a lesson." Thereupon Cook gave Carlson the \$5, and the latter handed it, with another \$5 of his own, to Wilson.

While Wilson was pretending to be trying to open the lock, Furey (indicted jointly with Wilson and Carlson) came up, and, displaying a police star on his coat, pretended to arrest the parties for gambling on the streets. Wilson, who had the money, ran away, but Furey arrested Carlson and Cook, and pretended to be taking them to the police station. While on the way, after stating to them that gambling on the street was a serious offense, punishable by imprisonment in the penitentiary for one year or by a fine of \$500, he asked them how much money they had. Cook said he had about \$60. Carlson said he had no money, but had a check for \$50. Furey proposed to let them go if they would give him the check and the money, and leave the city. They gave him the check and money, whereupon Furey returned Cook \$10 to pay his fare to his home in Dakota, released him and Carlson, started them in opposite directions, and told them to leave town. It is needless to say that Carlson, Wilson, and Furey were old acquaintances, and, as the evidence tends to show, confederates in the business of swindling.

Upon cross-examination Cook testified that he did not expect to make anything out of the bet, that he simply gave Carlson the \$5 as a favor, and that he would as readily have given it to him for any other purpose, as he supposed at the time that he (Carlson) was "all right." The point is made that, while these facts might amount to obtaining money by false pretenses or by duress, they do not constitute the crime of swindling by the means described in the statute; that neither the \$5 nor the \$50 were obtained by means of the lock, or any other form or device, within the meaning of the statute.

The object of the statute was, doubtless, to codify, and at the same time to expand, the common law on the subject of "cheats." To constitute a common-law cheat, the money or property must have been obtained by means of some false token, symbol, or device, as distinguished from mere words, however false and fraudulent. As the act of obtaining goods by false pretenses is made indictable by another section (6709), it must be held that, to constitute the crime of swindling, the property must have been obtained by some false token or device other than mere words.

In this case the padlock, displaying the secret spring to the intended victim, and getting up the sham bet, were the device by which the defendants obtained the complainant's money, although it might have been asked for under the guise of a loan to Carlson to enable him to bet. This amounted to more than mere words constituting false pretenses, and constituted a false device, within the meaning of the statute. It was not necessary, in order to constitute the offense charged, that Cook should have himself made, or joined in, the bet. Notwithstanding what Cook was brought to say on cross-examination, all the circumstances tend to prove that he was induced to part with his money through his "confidence in the device"; that is, that Wilson would be unable to open the lock, and hence that Carlson would win the bet.

If the \$5 were obtained by a false token or device, the offense charged was complete, without regard to the \$50 subsequently obtained by Furey, the bogus policeman. The latter sum was withdrawn by the court from the consideration of the jury, and hence need not be considered, although we are of the opinion that it also

was obtained by a false token or device. A false personation—that is, a man's calling himself by a false name—was not, at common law, and probably is not under the statute, a false token or device; but wearing and exhibiting a police star as a means of passing himself off as police officer is such a token or device; and it was by means of this, and the supposed official authority of the wearer, that the \$50 were obtained.

2. It is next contended that the court erred in receiving evidence of what occurred after Furey came on the scene, for the reason that the crime, if any, was already consummated, and what followed merely tended to prove the separate crime of extortion. There is no merit in this point. The evidence tended to prove almost conclusively that Carlson, Wilson, and Furey were confederated together for the common purpose of swindling Cook, and that all that was done from start to finish was done in furtherance of that purpose, and was all planned and contemplated from the beginning. It was all one transaction, and what occurred after Furey came up was competent for the purpose, if no other, of characterizing what had preceded.

3. Furey was present at the trial, and was positively identified by Cook as the man who participated in the swindle. The witness Johnson testified that Carlson, Wilson, and a man named Furey were in the habit of meeting in the saloon in which the witness was barkeeper; that this Furey in some respects resembled the man in court, but in other respects seemed to differ in appearance; that the witness could not swear that he was the same man; that it might be a brother; that the witness remembered the occasion of Carlson and Cook coming into the saloon for a drink; that Wilson and Furey were in the back part of the saloon at that time; that very soon after Carlson and Cook went out at the front door Wilson and Furey went out at the side door, and stood watching them going up Seventh avenue as far as Third street, and then started and followed them.

The witness, after stating that he had seen Carlson, Wilson, and Furey in the saloon together before that, was permitted to testify, under defendants' objection and exception, that he heard a conversation between them, in which Furey said to the other two, "Go

out and get a guy." It does not appear from the record when this occurred except that it was prior to the time that Carlson and Cook came into the saloon. The bill of exceptions does not purport to contain all the evidence introduced on the trial, or all that was introduced upon any particular issue or fact. Hence, for anything that appears, this conversation might have occurred on the same day, and immediately preceding the commission of the offense charged, so as to be really a part of the same transaction. But the evidence was admissible on broader grounds. Whatever may be said as to the identity of Furey, there was no question as to the identity of Carlson and Wilson. The conversation testified to was not a statement or admission made by Furey in their absence, but one made in their presence, and addressed to them in the course of a conversation between the three. There is no room for misunderstanding what the suggestion that they "go out and get a guy" meant. It tended to prove that the three, whoever the third may have been, were engaged in the business of swindling green or unsophisticated persons, called, in their vernacular, "guys."

The general rule is that, when offered simply for the purpose of proving a defendant's commission of the offense charged, evidence of his commission of other independent crimes is inadmissible. But there are exceptions, or rather apparent exceptions, to this rule. One of these is where the crime in question is one of a system of similar crimes in the commission of which the defendant is habitually engaged. This exception is particularly applicable to cases where the defendant is engaged in the commission of a system of successive frauds of the same kind; as, for example, a system of successive forgeries or of successive cheats or swindles of the same general nature. It is therefore competent to show that the defendant had been engaged in practicing like or similar cheats, as tending to prove a criminal intent.

4. When Carlson was arrested, about two months after the commission of the offense charged, there was found on his person a police star similar to the one worn by Furey at the time he personated a policeman, and assumed to arrest Cook and Carlson. It was competent for the state to prove this fact, notwithstanding the lapse of time and the fact that it was impossible to show that the

star found on Carlson was the identical one displayed by Furey. The weight of the evidence was for the jury.

The points raised by the remaining assignments of error are not of sufficient importance to require any consideration beyond stating that we are of opinion that they are without merit.

Order affirmed.

72 528
82 259

STATE OF MINNESOTA ex rel. H. D. MINCES v. L. SCHOENIG.

June 9, 1898.

Nos. 11,219—(256).

City of Winona—Ordinance—License for Bankrupt Sales.

An ordinance of the city of Winona provides for licensing the conductors of "gift, fire and bankrupt sales," and for taxing them two per cent. of the amount of the gross receipts of their sales. *Held*:

Tax Invalid—Const. art. 9, § 1.

(1) That the provisions for taxation are void, because in conflict with section 1 of article 9 of the constitution of the state; but their invalidity does not affect the validity of the provisions for licensing, the two being severable and independent.

Police Power.

(2) That it is within the police power of the state to require licenses for conducting "gift, fire and bankrupt sales."

Amount of License Fee.

(3) In view of the brief and transient character of such business at any one place, the court cannot hold that \$25 per month is an unreasonable license fee.

Same—Term of License—Divisibility.

(4) The city council is not required to grant an applicant a license for a portion of a month at a proportionate part of \$25.

Same—Discrimination between Applicants—Discretion.

The ordinance provides that the city council may, in its discretion, direct that a license shall be issued to an applicant who shall pay the required fee. *Held*, that this must be construed, not as giving the council an arbitrary discretion to discriminate between applicants without good cause or to refuse to grant any licenses in order to destroy or prohibit the

business, but merely a reasonable discretion, honestly exercised, to refuse a license where the applicant is an unfit person to whom to issue one, and that, thus construed, this provision of the ordinance is valid.

Writ of habeas corpus issued from the district court for Winona county, and directed to the chief of police of Winona. From an order, Snow, J., remanding relator to the custody of respondent, relator appealed. Affirmed.

Jas. A. Manly, for appellant.

George T. Simpson, for respondent.

MITCHELL, J.

The petitioner, having been arrested upon a warrant issued upon a complaint for a violation of an ordinance of the city of Winona, entitled "An ordinance to provide for the licensing of conductors of gift, fire and bankrupt sales, to regulate their manner of doing business, and to tax the proceeds of their sales," sued out of the district court of Winona county a writ of habeas corpus. Upon the hearing the court remanded the petitioner to the custody of the officer holding the warrant, and he thereupon appealed to this court. The sole question in the case is the validity of the ordinance. By the charter of the city of Winona, the city council is given power

"To provide for the licensing of auctioneers, peddlers, junk dealers, pawnbrokers, conductors of gift, fire, auction or bankrupt sales, and transient merchants, to regulate their manner of doing business and to tax their goods or the proceeds of their sales." Sp. Laws 1887, c. 5, subc. 4, § 3, subd. 5.

The ordinance is not contained in the record, but, as the district court of Winona county is required to take judicial notice of all ordinances of the city of Winona, this court will do so on appeals from that court. The ordinance contains two sets of provisions,—one relating to licensing the conductors of gift, fire, and bankrupt sales, and the other providing for payment by them of a tax of two per cent. of the amount of the gross receipts of their sales. This mode of taxation is so palpably in violation of section 1 of article 9 of the constitution, which requires that "all property on which taxes are to be levied shall have a cash valuation," that it cannot stand for a moment. The legislature itself has no power to adopt any such

system or taxation, or to grant authority to a municipality to do so.

But the provisions relating to licensing are severable from and independent of those relating to taxation, so that the invalidity of the latter does not render the former invalid. The rule in that regard as to a municipal ordinance is the same as applies to a statute enacted by the legislature. The first section prohibits any one from advertising or conducting a gift, fire, or bankrupt sale without first obtaining a license to do so. The second section provides that any person desiring to advertise or conduct any such sale shall make written application to the city council for a license stating the place where the sale is to be conducted, the kind of merchandise desired to be sold, and the length of time for which he wishes to obtain a license. The third section reads as follows:

"The city council may, in its discretion, direct that a license be granted and issued to such applicant upon his paying to the city treasurer the sum of \$25 for each month for which he shall apply for such license, such sum being hereby fixed as the license fee to be charged under the provisions of this ordinance."

1. We have no doubt that it is as much within the police power of the state to require licenses for conducting "gift," "fire," and "bankrupt" sales as it is to require licenses from pawnbrokers, peddlers, keepers of junk shops, ticket scalpers, keepers of loan offices, and the like. This class of sales now has a well-defined and well-understood meaning. They are usually conducted by transients and strangers, who stay only a short time in one place, who are sometimes honest men but often sharpers, who may deal honestly, but who often and even generally sell shoddy and inferior goods, and who attract trade by falsely representing that their goods are being sold at a great sacrifice, because they have been somewhat injured by fire, or because the owners are bankrupt, or by luring ignorant people to buy by the promise to distribute gifts to purchasers. They frequently practice frauds on the public, but because of their transient character they are gone before the fraud is discovered. The goods are usually sold at auction. It is a business which is legitimate if honestly conducted, but which, by reason of its peculiar character, is liable to become the means of perpetrating fraud and imposition on the public. The regulation of such a busi-

ness by license and other legitimate means is therefore within the police power of the state.

2. In view of the character of the business, and the comparatively short time it is usually carried on at one place, we cannot hold that \$25 a month is an unreasonable fee. It does not follow that, because \$300 a year might be unreasonable, \$25 a month would be. Neither is there anything in the point that the ordinance delegates to the licensee the power to determine the duration of the license. *In re White*, 43 Minn. 250, 45 N. W. 232.

3. Nor is there anything in the point "that the license fee is not apportioned to the time, and is therefore not uniform." By this we suppose counsel means that, if an applicant only wanted a license for one day or a few days, he would have to take a license for a full month, and pay \$25. The city council is not required to issue licenses to run the exact length of time that each different applicant may desire. It is within the power of the municipality to fix a uniform, reasonable term for which all licenses shall run, and if a party desires a license at all, he must take it on those terms. It is usual in the case of a permanent business to fix the term of licenses at one year; but in this case the city council, recognizing the brief and transient character of gift, fire, and bankrupt sales as usually conducted, has given applicants the privilege of taking out a license for a single month; and they have no reason to complain, because it has not given them the further privilege of taking out a license for a day or a week at a proportionate fee.

4. It is also urged that the ordinance was not designed as a legitimate exercise of the police power, for the reason that it contains no police regulations as to the manner of conducting the business. The provisions of the ordinance in that respect are somewhat meager, but the very fact that a license is required tends to exclude dishonest or otherwise unfit persons from conducting such sales; and the further fact that the licensee is required to state the place where the business is to be conducted enables the city to keep such sales under strict police surveillance, and see that they are honestly conducted. We do not think that this objection to the validity of the ordinance is well taken.

5. The only other objection that need be considered is based on

the language of the third section, viz.: "The city council may in its discretion direct that a license be granted and issued."

It is urged that this authorizes the city council arbitrarily to discriminate between applicants by granting a license to one and refusing it to another without any good reason, or to prohibit the business altogether by refusing to issue any licenses at all. If this is the necessary meaning and effect of the ordinance, it is clearly invalid; for a power to license and regulate is not a power to prohibit or destroy this business, or a power to discriminate between citizens arbitrarily and without good cause. But granting or refusing a license always involves the exercise of a reasonable discretion in determining whether the applicant is or is not a fit person to whom to issue a license.

A city council is not absolutely bound to issue a license to conduct such sales to every applicant, regardless of his character, who will pay the required fee. If the applicant is notoriously dishonest, or in the habit of resorting to fraudulent tricks and devices in conducting sales, the city council would be justified in refusing him a license. The power to grant licenses implies the power to refuse to do so for good cause. If they should arbitrarily, and not in the honest exercise of a sound discretion, refuse to grant a license for the purpose either of discriminating between citizens, or of prohibiting the business altogether, no doubt the aggrieved party would have his legal remedy. But, as in the case of an act of the legislature, so in the case of a municipal ordinance, every presumption is in favor of its validity. Hence, if it is susceptible of two constructions, that one must be adopted which will sustain the ordinance. Indeed, in many cases the courts will, if necessary in order to sustain a statute or ordinance, cut down its language below its ordinary and natural meaning. Under this rule, we think this ordinance should be construed as merely giving to the city council that reasonable discretion which they would have possessed in any event.

Order affirmed.

CLARA D. COYNE v. MISSISSIPPI & RUM RIVER BOOM COMPANY.

June 14, 1898.

Nos. 11,009—(137).

Injury to Riparian Owner—Negligent Management of Boom—Break of Log Jam.

If a party, in the exercise of a legal right,—more especially one conferred by statute,—does an injury to another's property, he is not liable for damages, unless they were caused by his want of the care and skill ordinarily exercised in like cases.

Same—Navigable Stream—Due Care—Riparian Rights.

The right of passage on a navigable stream is a common and paramount one, but must be exercised with due regard to the rights of riparian owners, and with ordinary care and skill. Floating logs in such a stream may cause damage to the estate of such owners; but if driven in an ordinarily careful, prudent manner, the party driving is not liable for damages which may result to the riparian owners.

Appeal by defendant from an order of the district court for Anoka county, Tarbox, J., denying a motion for a new trial, after a verdict in favor of plaintiff for \$150. Reversed.

John B. Atwater, for appellant.

Everett Hammons, for respondent.

COLLINS, J.

Plaintiff had a verdict in an action brought to recover for injuries claimed to have been caused by reason of defendant's construction and maintenance of certain piling, piers, and booms in the Mississippi river, above plaintiff's farm, whereby huge quantities of logs and ice were accumulated and held back in the spring of 1897, and then, because of the breaking away of the piling, piers, and booms, alleged to have resulted from defendant's negligent management and operation thereof, suddenly precipitated down the river and upon plaintiff's farm, by reason of which soil and trees along the banks were swept away and destroyed. Defendant's appeal is from an order denying its motion for a new trial, and the assignments of error go to the claim of counsel that the court should have dismissed the case when plaintiff rested; that there was

error in the admission of certain evidence in rebuttal; that the charge to the jury was erroneous in respect to the grounds upon which plaintiff could recover, and also in reference to the time up to which damages might be estimated in case damages were awarded to her.

The defendant is a corporation duly organized and acting under the provisions of Laws 1857 (Ex. Sess.) c. 60, and several amendatory acts. Its power and authority to build and construct piling, piers, and booms in the river mentioned,—a navigable stream,—and its right to handle and drive logs, under its franchise, stand conceded. It was exercising a lawful privilege when it erected piling and piers and maintained its booms at the point in question, but it was bound to exercise this privilege with due regard to the concurrent rights of riparian owners, above and below, to the use of their lands. And, as before noticed, the cause of action set forth in the complaint was based upon an allegation of defendant's negligence in the management and operation of its works above plaintiff's farm.

A part of the evidence was directed towards establishing that a great quantity of logs and ice gathered at defendant's piling, piers, and booms, causing a jam, and then broke loose, rushing down in a mass, and tearing and washing out more or less of the soil along the shores of the stream where it flowed through the farm; and a part was produced for the purpose of showing that defendant was careless and negligent in the management and operation of its booms, and carelessly and negligently allowed the jam to form, and then to break; and the court charged the jury upon this branch of the case. But it went further, and charged, in substance, that if the tearing and washing away of the soil along the shores were caused by the obstructions placed in the river by defendant, and this result might have been foreseen by an ordinarily prudent man, this constituted a taking of plaintiff's property, within the meaning of the law, for which defendant would be liable without regard to its negligence or carelessness in maintaining or operating its works. To this part of the charge defendant's counsel duly excepted.

We infer that the court relied upon the case of *Weaver v. Mississippi & R. R. Boom Co.*, 28 Minn. 534, 11 N. W. 114, when using this

language. But the facts are not at all similar, for in that case it appeared that the company built its piers and hung its booms on Weaver's land, and directly invaded and appropriated it, not only by those acts, but by flooding with water, and casting quantities of logs and drift thereon, which, remaining when the water subsided, destroyed the usefulness of the land. It was with reference to these facts that it was held that there had been a taking of plaintiff's property by defendant, for which compensation could be recovered. It was not a mere consequential injury to plaintiff's land which was under consideration in the Weaver case, but a physical invasion and appropriation by a defendant who was not exercising a legal right when so doing. The authority relied on is not in point.

The defendant, in the exercise of its corporate franchise, and to facilitate its authorized work of handling and driving logs in a navigable river, constructed its piling and piers, and then hung booms,—one extending from an island on the east side of the main channel to the east shore; the other, from an island on the west side of said channel to the west shore; leaving the main channel, between the two islands, unobstructed. Logs were pocketed in both of these booms, but the latter did not give way, nor did the logs escape. The injuries complained of resulted from the jam which formed in the channel between the islands while defendant was lawfully handling and driving the logs from above. As the river was a navigable stream, the public, as well as defendant under its charter, had the right to use it as a highway for the floating or driving of logs; and the rights of riparian owners were subordinate to this use, if reasonably exercised. *Doucette v. Little Falls Imp. & Nav. Co.*, 71 Minn. 206, 73 N. W. 847.

The doctrine stated in 1 Hilliard, Torts, 103, thus, "If a party, in the exercise of a legal right,—more especially one conferred by express statute,—does an injury to another's property, he is not liable for damages, unless they were caused by his want of the care and skill ordinarily exercised in like cases," is the one applicable where the right of passage in a navigable stream is involved. The right is a common and paramount one, but must be exercised with due regard to the rights of riparian owners. The use of the stream must

be reasonable, and must be exercised with ordinary care and skill, such as the great mass of mankind would exercise under like circumstances when driving logs. The party using the highway is not an insurer, but he must not be negligent and careless. Floating logs may cause damage to the estate of the riparian owner; but, if the party floating or driving the same uses due care and skill, he is not liable for such damage.

"Land on navigable streams is subject to the danger incident to the right of navigation, and where logs are driven in a stream in an ordinarily careful, prudent manner, the owner is not liable for damage which may result to the riparian owner."

Field v. Apple River, 67 Wis. 569, 31 N. W. 17; Harold v. Jones, 86 Ala. 274, 5 South. 438; White v. Nelson, 45 Mich. 578, 8 N. W. 587, 909; Lawler v. Baring, 56 Me. 443; Hollister v. Union Co., 9 Conn. 436; Lansing v. Smith, 8 Cow. 146; Thompson v. Androscoggin, 54 N. H. 558.

The gravamen of an action of this kind is defendant's negligence, and the charge was incorrect. We need not consider other alleged errors.

Order reversed.

PLEIADES E. STAUGHTON v. VERRAZANO SIMPSON and Another.

June 14, 1898.

Nos. 11,026—(128).

Interest—Oral Agreement to Pay More than 7 per cent.

Held, an oral agreement to pay interest at a rate greater than 7 per cent. per annum cannot be enforced except to the extent of 7 per cent.

Doing Equity—Limitation of Rule.

Held, the rule that he who seeks equity must do equity should not be so applied as to work out a result that would be against equity and good conscience.

Appeal by plaintiff from an order of the district court for Winona county, Snow, J., denying a motion for a new trial. Reversed.

Lloyd Barber, for appellant.

Webber & Lees, for respondents.

CANTY, J.¹

This is the second appeal in this action. See 69 Minn. 314, 72 N. W. 126. After the mandate on the last appeal was filed in the court below, the case was again tried, and the court found that the quitclaim deed from De Graff to defendant was intended by all parties as a mortgage to secure the payment to defendant of the \$3,864.18 paid by him to De Graff on March 28, 1877. The court further found

"That said payment last mentioned was made by said defendant, and said deed from said De Graff was taken by him in pursuance of an oral agreement or understanding between the said defendant and plaintiff's said husband that, if the latter should within a reasonable time repay to the said defendant the said sum so as aforesaid paid by the said defendant to said De Graff, with interest payable semiannually, until full payment should be made, at the rate of 12 per cent. per annum, and also all taxes which the said defendant might pay in the meantime on said premises, with interest, then upon such repayment all right, title, or claim of the defendant in or to said premises should cease and determine."

The court allowed interest at the rate of 12 per cent. per annum on all of said sum of \$3,864.18 remaining unpaid from time to time, but allowed interest only at the rate of 7 per cent. per annum on the amount due for the taxes paid by defendant. On this basis the court found that there was due to defendant on November 13, 1897, the date of the findings, \$2,058.77, and ordered judgment of strict foreclosure unless the same was paid. From an order denying a new trial plaintiff appeals.

Appellant contends that the trial court erred in allowing interest at the rate of 12 per cent. per annum as aforesaid. As the law stood in 1877, interest at the rate of 12 per cent. per annum was not usurious, but the statute (G. S. 1878, c. 23, § 1) provided:

"Interest for any legal indebtedness shall be at the rate of seven dollars upon one hundred dollars for a year, unless a different rate is contracted for in writing."

The court found that the contract in this case to pay 12 per cent. per annum was an oral one. Then, under the statute, it cannot be

¹ BUCK, J., absent, took no part.

enforced. *Swank v. Great Northern Ry. Co.*, 63 Minn. 258, 65 N. W. 452.

Respondent contends that this is a case for the application of the maxim, "He who seeks equity must do equity." We cannot so hold. That rule should only be applied to cases where the result that would be worked out without its aid would be against equity and good conscience. In fact, it would be against equity and good conscience in this case to require plaintiff to pay 12 per cent. per annum, except, perhaps, for the first few years after the loan was made by defendant, in 1877. This is not a case where it is necessary to invoke the maxim in question for the purpose of preventing a forfeiture or gross injustice. Under the statute, plaintiff is entitled to recover 7 per cent. per annum,—a rate which is certainly not grossly inadequate. If defendant brought an action to foreclose his mortgage, that is all he could recover; and he should not be given such a vastly greater advantage merely because the parties are reversed, and plaintiff is attempting to redeem.

However, the sum of \$232 was paid at the end of the first six months, and the same amount at the end of the first year. The receipt given by defendant for the former amount states that it is for interest to September 28, 1877, and the receipt given for the latter amount states that it is for interest to March 28, 1878. Then interest was paid at the rate of 12 per cent. for the first year, was so applied by the parties, and the court will not disturb the application thus made of the payments.

It appears from the receipts given for many of the subsequent payments that these payments were also applied by the parties to the interest. But the amount of these payments did not at any time exceed the interest at the rate of 7 per cent. per annum, except to a small amount in a few instances. But, even if these payments exceeded such rate by a considerable amount, the result would be the same, because, by allowing only 7 per cent. interest for the rest of the time, the debt had been considerably overpaid. The debt being all paid, plaintiff is entitled to judgment, and this renders it unnecessary to consider the other questions raised.

The order appealed from is therefore reversed, so far as it grants defendant any relief, and the case is remanded to the court below,

with directions to enter judgment for plaintiff on the findings of fact in conformity with this opinion.

R. G. BAUSHER v. CITY OF ST. PAUL.

June 14, 1898.

Nos. 11,044—(133).

Municipal Corporation—Notice of Claim for Injury—Laws 1897, c. 248.

Laws 1897, c. 248, requiring notice to cities and villages of the injury for which damages are claimed, is mandatory, is a condition precedent to a right to maintain an action for such damages, and, unless the notice served states the amount of compensation claimed for the injury, no action can be maintained against the city therefor.

Same—Statement of Amount Claimed.

Where the claim is for money compensation, it is not sufficient, under this statute, that the notice state the nature of the relief demanded, without stating the amount of compensation claimed.

Same—Laws 1897, c. 248—Constitution—Title of Act.

Held, the title of said chapter 248 is sufficient, under section 27, art. 4, of the constitution.

Same—Special Legislation.

Held, the act does not contravene section 33 of said article 4.

Appeal by plaintiff from an order of the district court for Ramsey county, Brill, J., sustaining a demurrer to the complaint. Affirmed.

Hubbard & Taylor, for appellant.

James E. Markham and Carl Taylor, for respondent.

CANTY, J.

This is an action to recover damages for a personal injury. Plaintiff, in his complaint, alleges facts from which it appears that on September 29, 1897, while he was walking along a certain public street in St. Paul, he was injured by reason of the defective and rotten character of the sidewalk on which he was walking, and that the injury occurred by reason of the negligence of the city in failing

72	539
174	160
74	161
72	539
76	22
72	539
74	201
72	539
80	417

to keep the sidewalk in repair; that within 30 days thereafter he caused a notice to be served on the city, by handing a copy thereof to the mayor, and another copy thereof to the city clerk of the city. The notice so served is set out as a part of the complaint. The defendant demurred to the complaint on the ground that it does not state a cause of action; and from an order sustaining the demurrer, plaintiff appeals.

The question raised is whether the notice is sufficient. It is sufficient under Sp. Laws 1885, c. 7, § 19, which merely requires the notice to state

"The place where, and the time when, such injury was received, and that the person injured will claim damages of the city for such injury."

1. But the notice is not sufficient under Laws 1897, c. 248, § 1, which reads as follows:

"Before any city, village or borough in this state shall be liable to any person for damages for, or on account of, any injury or loss alleged to have been received or suffered by reason of any defect in any bridge, street, road, sidewalk * * * the person so alleged to be injured * * * shall give to the city or village council, or trustees, or other governing body of such city, village or borough, within thirty days after the alleged injury, notice thereof; and shall present his or their claim to compensation to such council or governing body in writing, stating the time when, the place where and the circumstances under which such alleged loss or injury occurred and the amount of compensation or the nature of the relief demanded from the city, village or borough, and such body shall have ten days' time within which to decide upon the course it will pursue with relation to such claim; and no action shall be maintained until the expiration of such time on account of such claim."

We are of the opinion that this statute applies to St. Paul. Appellant contends that the city clerk, on whom the notice was served, is ex officio clerk of the city council of St. Paul, and keeper of its records, and that service on him is service on the council. Conceding, without deciding, that this is true, we cannot hold that the notice served complies with this statute. Such notice does not state the amount of compensation claimed by appellant, and without this the notice is, in our opinion, fatally defective. Such statutes requiring notice of the injury as a condition precedent to the

right to maintain an action, are mandatory, and must be complied with. *Nichols v. City of Minneapolis*, 30 Minn. 545, 16 N. W. 410; *Harder v. City of Minneapolis*, 40 Minn. 446, 42 N. W. 350.

2. The statute provides that the notice shall state "the amount of compensation or the nature of the relief demanded from the city." Appellant contends that, as these two provisions are in the alternative, it is only necessary to comply with the one or the other of them; that he has stated the nature of the relief demanded, and therefore his notice is sufficient. We cannot so hold. In our opinion, the clause, "nature of the relief demanded," is not intended to apply to such a case as this, but to cases where some other relief than money compensation is demanded.

3. We are also of the opinion that the title of said chapter 248, Laws 1897, is sufficient.

4. We are also of the opinion that said act is not special legislation, and does not contravene section 33, art. 4, of the constitution.

The order appealed from is affirmed.

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